IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BOBBY BOYE,	:	NO. 18-3662
	:	
Petitioner-Appellant,	:	
	:	On appeal from a final order denying
v.	:	relief pursuant to 28 U.S.C. § 2255
	:	of the United States District Court
UNITED STATES OF AMERICA,	:	for the District of New Jersey,
	:	No. 3-16-cv-06024 (FLW)
Respondent.	:	
	:	

PETITIONER BOBBY BOYE'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Petitioner Bobby Boye asks the Court to review whether he received ineffective assistance of trial counsel warranting a new sentencing hearing in his case. Reasonable jurists can disagree on whether petitioner's (defendant's) counsel argued the correct federal law governing calculation of the "loss" in this unusual wire fraud case where a highly-educated and licensed global attorney (Mr. Boye) "posed" as a larger, multi-person law firm but, it is undisputed, prepared and provided to victim Timor-Leste ("Country A" in the District court's decision), the sophisticated legal and regulatory work contracted for -- work that Timor-Leste praised as excellent and continues using today.[1]

[1] Attached hereto in further support of this Application are the District court's November 20, 2018 Decision (Ex. A) and the Certification (Ex. B), Supplemental

The Charges against Petitioner

1. Mr. Boye had been employed as an international petroleum legal advisor for Timor-Leste's Ministry of Finance since 2010.

2. 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, Mr. Boye 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 sole discretion of the Minister of Finance.

3. In March 2012, a company called "Opus & Best Services LLC" submitted a bid for the contract. The company appeared to be composed of several lawyers and other professionals. In reality, Mr. Boye was the sole member. Timor-Leste awarded Opus & Best the contract in June 2012.

4. The Government charged Mr. Boye with one count of conspiracy to commit write fraud and one count of wire fraud based on false representations in the bid that Mr. Boye submitted via the fictitious "Opus & Best," including: "falsely claiming that Opus & Best was a legitimate law and accounting firm; and

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Certification (Ex. C), and Reply Certification (Ex. D) of Bobby Boye filed in support of his 2255 Petition below.

fraudulently failing to disclose his affiliation with Opus & Best, in contravention of the no-conflict of interest bidding requirements."

5. Petitioner acknowledged deceiving Timor-Leste in procuring the contract.[2] He pleaded guilty to conspiracy to commit wire fraud in violation of 18 U.S.C. § 1843 and 18 U.S.C. § 1849. The plea agreement that Mr. Boye's assigned trial lawyer counseled him to sign stipulated to an offense level of 24, 18 of which were based on a stipulation that the "aggregate loss" caused to Timor-Leste "is greater than $2,500,000 but not more than $7,000,000." Mr. Boye was sentenced to 72 months imprisonment as a result of this loss calculation (but for the 18 point increase for the loss calculation, Mr. Boye's sentencing range would have been as low as a probationary sentence).

Mr. Boye's arguments in his 2255 Petition

6. Petitioner argued that his trial counsel was constitutionally deficient by failing to argue to the sentencing court the correct federal law on how to calculate the "loss" caused to Timor-Leste by defendant's deception. Counsel

[2] Defendant admitted during the plea colloquy that he created "Opus & Best for the purpose of bidding for the contract." He "author[ed] several fraudulent documents submitted by Opus & Best to" Timor-Leste to support Opus & Best's "bid for the contract." Defendant "pa[id] a relative to create a website for Opus & Best, which contained numerous misrepresentations, including but not limited to, false claims regarding Opus & Best's credentials and experience…" Defendant did this to induce Timor-Leste to award him the contracts. (Plea Transcript (1T) 27:10-25).

- Failed to raise during plea bargain and argue at sentencing that 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," applied and shows that the "loss" caused to Timor-Leste was nothing or certainly far less than "greater than $2,500,000 but not more than $7,000,000";
- Failed to argue that Boye did not "pose" as a licensed professional because he is a licensed and highly-educated lawyer.[3] He thus was entitled to credit,

[3] 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. He earned a Barrister at Law Degree from the Nigerian Law School, Victoria Island, Legos, Nigeria, and was subsequently enrolled as a Barrister and Solicitor of the Nigerian Supreme Court. Once in the United States, defendant attended University of California, Los Angeles (UCLA) Law School between August 1997 and May 1998, and earned a Master of Laws (LLM) degree on May 22, 1998. On May 24, 2000, defendant earned a Master of Business Taxation from University of Southern California (USC). (PSR 22-23). Before being employed with the Government of Timor-Leste as an International Petroleum Advisor, defendant held numerous positions, including a Senior Business Leader in the Tax Division with Master Card Services, Purchase, New York; Global Tax Director 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).

per Sentencing Guideline § 2B1.1, Application Note 3(E)(i), for the sophisticated legal work he provided to Timor-Leste;

- Failed to present to the District court the substantial legal and regulatory work that Mr. Boye prepared and provided to Timor-Leste under the three contracts in question – work that Timor-Leste praised as excellent and continues using today;
- Misadvised Mr. Boye to accept a plea agreement that stipulated to a "loss" figure that contravenes governing federal sentencing law by failing to credit Mr. Boye for the legal and regulatory work he was qualified to prepare and indeed provided to the victim;
- Failed to raise during plea bargain or argue at sentencing that the bid solicitation document issued by Timor-Leste (Exhibit A of the Certification marked as Exhibit B herewith) – 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 whatsoever as a pre-condition for submitting a bid;
- Failed to raise at plea bargain or argue at sentencing that there is no law in Timor-Leste – being the place where the contracts were executed (not in the United States) – 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);

- Failed to raise at plea bargain and at sentencing that the allegedly misleading bid submitted by Opus & Best LLC was in relation to one of the contracts (TDA Regulations), and that the two subsequent contracts awarded by Timor-Leste (Interpretative Guidelines and Transfer Pricing) were no-bid contracts and completely separate from the contract associated with the misleading bid forming the subject of the criminal complaint against Mr. Boye.

7. Trial counsel's deficiencies and misadvice to Mr. Boye on how the law applied to his case resulted directly in the 72-month sentence premised almost entirely on the "loss" calculation.

8. Defendant argued, in his 2255 petition, that his trial counsel failed to understand the unusual circumstances of this case. Unlike the typical wire fraud claim where a defendant induces the victim to pay for goods or services that the defendant never provides, Mr. Boye prepared and provided to Timor-Leste the work called for by the contracts – the sophisticated legal and tax accounting advice and regulatory work. Though Mr. Boye admitted duping Timor-Leste into awarding him the contracts under the guise of "Opus & Best" and accepted

responsibility for this deceit, Mr. Boye was fully capable of performing and performed the sophisticated legal work called for.

9. Even the District court acknowledged that the laws and regulations, and accompanying guidelines and "Transfer Pricing," that defendant prepared and provided to Timor-Leste was expertly done (this work was attached to Mr. Boye's Certification filed below and is attached hereto as Ex. B). Timor-Leste continued paying "Opus & Best" for the work in installments as the work was produced, in accordance with the benchmarks prescribed by the contracts. The work that defendant provided to Timor-Leste under the first contract was so outstanding, in fact, that Timor-Leste simply hired "Opus & Best" two more times in second and third "no-bid" contracts. These second and third contracts ("Transfer Pricing Study Report" and "Interpretative Guidelines for TDA & TBUCA") were awarded to "Opus & Best" without any bids because of the excellent work that Mr. Boye produced per the first contract ("Taxes and Duties Regulations and Taxation of Bayu-Undan Contractors Act"). And Timor-Leste continued paying for the work as it was produced.

10. Defendant trial counsel – both at the time of plea bargain negotiation and at sentencing – failed to argue that these facts affected the calculation of the "loss" that Timor-Leste suffered. Counsel did not even submit to the U.S. Attorney during plea bargain negotiation nor the District Court the sophisticated

work product that the defendant provided to Timor-Leste under the three contracts (Ex. B, attached). Nor did counsel advise the U.S. Attorney or the District court that the defendant retained other professionals like Peter Chen, a licensed attorney and CPA, to help prepare the work for Timor-Leste.

http://www.zhonglun.com/En/lawyer_298.aspx (profile page for Peter Guang Chen, Partner in the Hong Kong Office of Zhong Lun Law Firm, and including under "Representative Cases," "Recently, Mr. Chen has been engaged by the Ministry of Finance of a South Asian nation to draft the country's tax regulations and to provide consulting on international tax matters.") Nor did counsel provide the sentencing court with the subcontract agreements, billings, and evidence of payments by defendant to Mr. Chen and the other professionals hired as part of the team performing the contracts with Timor-Leste. Nor did counsel tell the court that the face value of the three contracts was $4.9 Million. $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 to Timor-Leste. Such professional deficiencies were exhibited by trial counsel throughout the plea bargain process.

11. These facts should have been brought to the sentencing court's attention because they affected calculation of the "loss" under the governing sentencing guidelines. Instead, Attorney Thomas counseled Mr. Boye to sign a plea agreement that stipulated that "the aggregate loss amount is greater than

$2,500,000 but not more than $7,000,000" causing "an increase of 18 levels" and, consequently, a giant increase in the length of Mr. Boye's sentence.

12. By the time sentencing day arrived, it was too late to argue these facts. Nothing in the Presentence Report addressed the fact that defendant provided value back to Timor-Leste in exchange for the monies paid to him, or addressed the outstanding sum of $1.4 million that Timor-Leste owed to defendant under the second and third contracts for the work defendant provided under these contracts (work that Timor-Leste continues to use and benefit from). Though trial counsel's Sentencing Memorandum finally noted, "[t]he penultimate question Your Honor will resolve on Thursday, October 15, 2015, at 11:00am is *What sentence should Mr. Boye receive when the fraud he committed was in the acquisition of a contract,* ***but*** he *delivered the work-product to the victim, the victim has never complained about the work-product and continues to use it, and the victim will be made [whole] by seized property and restitution?,*" Mr. Thomas had already counseled Mr. Boye to stipulate to a loss that called for a sentencing range of at least 63 months in prison (see District court decision at 3, Ex. A). The District court rejected attorney Thomas' last minute "argument for a credit for legal services provided to" Timor-Leste, ruling, consistent with the stipulation and Presentence Report, that the "loss" was the entire amount of the money that Timor-Leste paid to Mr. Boye with no credit for the work that defendant provided back:

> We all know that you placed yourself in a tremendous conflict of interest and you understood that which is why you hid it so well. But it wasn't just you presenting that this was an Opus & Best with one man at the top -- not you, whoever you wanted to claim it was going to be -- but you had a host of professionals that you represented to be part of this company with resumes to match that would indicate they were looking at a multi-million dollar contract of work that was going to go forward to give them advice both from an accounting and legal perspective, which is why when you created this company you didn't just make it a two or three-person company. You presented it as a dozen people, 20 people who could perform all these different services.
>
> Because as we know when you are talking about something of this level nobody goes out and hires the solo practitioner out there with the shingle out, but looks for the big firms that have many individuals that can perform the different kinds of work at any given time. So you very well plotted out what it would be that would be necessary to convince, one, the other two on the committee to make a recommendation and ultimately the country to accept this sham company.
>
> So let's not be fooled today that if you just said, I could do all the work for you, that they would have said, great, come in, do everything, be our advisor, be everything else too, a one-man-show.
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> [Sentencing Transcript (2T) 35:1-36:25]

13. The District court said that defendant's preparation and presentation of the work to Timor-Leste did not "mitigate the crime."

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

> I have sat and seen many defendants in fraud cases obtaining contracts from government. Here it's generally here in the US. This happens to be a foreign country. But obtaining contracts that are sent out for bidding and obtaining them through fraud or bribes. And in virtually all of those cases they did the work. Whether it was a demolition contractor, or whoever it might have been, it wasn't a mitigating factor because they did the work. That was the only way they were going to get paid and they may have been capable of doing the work. But here it's how you went about getting it and the fact that not only did you do it dishonestly, but it prevented honest bidders from getting the work that could have also done the work and been paid the same money. It's a fraud upon the country.
>
> It's more egregious in my mind because it was not just upon a corporation who may have some kind of insurance or whatever that could make them whole, and not just done to our country, but you were really sent out there in some ways as a personal ambassador to this country hand picked by Norway to assist an underdeveloped poor country.
>
> It's almost akin to what we call the vulnerable victim here, but it's not exactly. But I'll point out, this particular country that welcomed you and that you took advantage of, the crime is extremely serious and I won't go through all the aspects of it at this point. [2T 37:1-38:25]

Standard for Granting a Certificate of Appealability

14. The Court of Appeals may grant a certificate of appealability where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has made clear that a certificate should issue if "jurists of reason could disagree with the district court's resolution of [the defendant's] 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, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

15. Recently, in Buck v. Davis, 580 U.S. ___, 137 S. Ct. 759 (2017), Chief Justice Roberts, writing for the Court, held that the certificate of appealability "inquiry, we have emphasized, is not coextensive with a merits analysis." "[T]he question for the Fifth Circuit was not whether Buck had 'shown extraordinary circumstances' … Those are ultimate merits determinations the panel should not have reached. We reiterate what we have said before: A 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,' and ask 'only if the District Court's decision was debatable.'"

The Court should grant a Certificate in Mr. Boye's case

16. Reasonable jurists can disagree on whether the District court properly denied Mr. Boye's ineffective assistance claim on 2255 relief. The District court said that Mr. Boye'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.'" Decision at 9 (Ex. A). The stipulation is meaningless if

defendant's trial counsel was constitutionally deficient in advising Mr. Boye to sign it. Most importantly, the plea bargain agreement provides that Mr. Boye is entitled to collaterally challenge the plea, if among other factors, the trial counsel provided a constitutionally ineffective assistance of counsel, and this crucial provision of the plea agreement was affirmed by the District court at page 16 of the Plea Transcripts.

17. The District court ruled 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). "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." (Decision at 11). The District court reasoned,

> 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.
> [Decision at 11-12, Ex. A hereto]

18. Reasonable jurists can disagree with the District court's application of the sentencing guidelines governing "loss" in this case. Reasonable jurists can disagree about whether trial counsel was deficient in failing to highlight to the sentencing court the substantial and sophisticated legal and regulatory work that Mr. Boye provided to Timor-Leste and argue that, per Section (E) of the Notes, Mr. Boye must be credited for the value of the legal work provided (per Sentencing Guideline § 2B1.1, Application Note 3(E)(i), providing, "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").

19. Reasonable jurists can find that defendant's counsel failed to argue that the Guideline exception on which the District court relied applies only to persons posing as attorneys, doctors, or other licensed professionals, not to actual licensed professionals like Mr. Boye. See, e.g., United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996) (noting loss calculation "does not credit the value of …

unlicensed benefits provided") (emphasis added); *U.S. Sentencing Guidelines Manual* app. C, vol. II, amend. 617, at 183-84 (2003). Courts that have applied the Section (V) Note have done so where the defendant has posed as a licensed professional. See, e.g., United States v. Bennett, 453 F. App'x 395, 397 (4th Cir. 2011) ("Bennett posed as a doctor in purporting to provide the services of an MRO"); United States v. Kieffer, 621 F.3d 825, 834 (8th Cir. 2010) (applying U.S.S.G. 2B1.1 cmt. n. 3(F)(v)(I) to "attorney-impersonator"). The presumptive rule governing calculation of loss, not this narrow exception for imposters, should have and would have applied had defendant's counsel asserted this caselaw on Mr. Boye's behalf during plea bargaining and before sentencing. An assigned criminal defense lawyer is obligated to know the Sentencing Guidelines and relevant Circuit precedent and argue such critical issues on his client's behalf -- not just surrender to whatever stipulations the government has placed into the 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). Attorney ignorance of laws that are fundamental to his client's case -- as proper calculation of the loss was in Mr. Boye's case -- is a "quintessential example" of unreasonable performance under Strickland. Hinton v. Alabama, 571 U.S. 263, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014).

20. Though denying a certificate of appealability below, the District court seemed to acknowledge that reasonable jurists can disagree on the proper calculation of the "loss" in a case like Mr. Boye's and, consequently, whether trial counsel should have done more for his client to show to the sentencing court that the loss was not as alleged by the government:

> 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. [Decision at 10-11]

See also 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"); United States v. Nathan, 188 F.3d 190, 210 (3d Cir. 1999) (court in "fraudulent procurement case"

calculates loss by "offset [ting] the contract price by the actual value of the components provided"); 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" and remanding for determination "as to whether, and to what extent, Rubin's contract resulted in a loss to the Senate"); 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").[4]

21. Reasonable jurists can find that Mr. Boye suffered prejudice and disagree with the District court's analysis, which reasoned,

> 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

[4] Defendant's counsel was likewise deficient in failing to cite the governing law on 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). Counsel did not cite and argue this law on defendant's behalf, so the Court did not apply this rule in calculating the restitution order in this case.

> calculation of loss and argues only that but for counsel's errors, the result 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 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 lower sentence. [Decision at 12]

The District Court's reasoning is clearly debatable by reasonable jurists, considering the uncontroverted sworn statements of defendant alleging prejudice particularly at pages 6-8 of Exhibit D attached hereto and paragraph 6 of the same Exhibit. The District Court also ignored paragraphs 9, 13 and 18 of Exhibit B as well as paragraphs 9, 10 (l), 11-13 and 16 of Exhibit C. Furthermore, the Supreme Court has observed 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. Absent unusual circumstances, he will not be required to show more. Molina-Martinez v. United States, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016).

22. Reasonable jurists can find that the defendant sufficiently alleged and proved the particulars of ineffective assistance of counsel related to the plea bargain, and therefore disagree with the District court's reasoning that "equally

fatal to Boye's claim of ineffective assistance related to the plea bargain agreement is Boye's failure to allege any prejudice that resulted from the alleged deficiency of counsel." Decision at 13. Defendant clearly indicated that he would have gone to trial if counsel had correctly advised him about the calculation of the loss. Mr. Boye stated as such at paragraph 2 of page 7 and at pages 31-32 of Exhibit D that he would have gone to trial if he had received effective assistance of counsel. The prejudice that defendant suffered as a result of the deficient services of his counsel in relation to the plea bargain agreement are memorialized in paragraphs 7-13 of Exhibit B, paragraphs 7-15 of Exhibit C, and paragraphs 3, 5, 6, 10-13 and 15-16 of Exhibit D (all of which the District court ignored in denying 2255 relief below).

CONCLUSION

For all these reasons, we respectfully ask the Court to grant this application for a Certificate of Appealability and permit Mr. Boye's appeal to proceed to briefing and decision on the merits by this Court.

Respectfully submitted,

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