No. 18-3662

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BOBBY BOYE,
Appellant

v.

UNITED STATES OF AMERICA
Appellee

Appeal from a Final Order of the United States District Court for the District of New Jersey in a Proceeding Under 28 U.S.C. § 2255 (Civ. No. 16-cv-06024). Sat Below: Honorable Freda L. Wolfson, U.S.D.J.

BRIEF FOR APPELLEE

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"A"	refers to Appellant's Appendix.
"DB"	refers to Appellant's Brief.
"PSR"	refers to the Pre-Sentence Report filed under seal with this Court.

JURISDICTIONAL STATEMENT

This appeal is from a final order of the United States District Court for the District of New Jersey denying relief pursuant to 28 U.S.C. § 2255. The District Court had subject matter jurisdiction under 28 U.S.C. § 2255(a). After granting a limited certificate of appealability pursuant to 28 U.S.C. § 2253(c), this Court has jurisdiction over this appeal pursuant to 28 U.S.C. 2253(a) and § 2255(d).

STATEMENT OF RELATED CASES AND PROCEEDINGS

Boye filed a notice of direct appeal, which this Court dismissed by summary affirmance due to the appellate waiver in Boye's plea agreement. *United States v. Bobby Boye*, C.A. No. 15-3779 (3d Cir. 2016). A1508. There are no other related cases currently before the Court on either direct appeal or collateral appeal.

STATEMENT OF THE ISSUES

1. May plea counsel be deemed ineffective for supposedly negotiating an insufficiently advantageous plea deal in which Boye stipulated to a loss amount which was legally correct under U.S.S.G. § 2B1.1 Application Note 3(F)(v)(I), which denies credit against loss to individuals who falsely pose as licensed professionals?

2. Did Boye exceed the scope of his certificate of appealability by arguing that counsel was ineffective at sentencing for not breaching the plea agreement to argue that Boye's loss amount should have been off-set by the value of the services he purportedly rendered to his victim?

3. Did Boye exceed the scope of his certificate of appealability by arguing that counsel was ineffective for failing to argue for a reduced restitution award, a claim which is not even cognizable under 28 U.S.C. § 2255?

STATEMENT OF THE CASE

I. Factual Background

Bobby Boye emigrated from Nigeria to the United States in 1994, at the age of 27, thereafter earned two masters degrees, gained employment in the securities industry, and became a naturalized U.S. citizen by 2005. PSR ¶83. But his was not the typical "American Dream" success story. Instead, Boye's life story reads like an episode of "*American Greed.*"[1]

A. Boye Establishes a Pattern of Defrauding His Employers.

In 1998, Boye, using the surname "Ajiboye," PSR ¶107, entered the securities industry and accepted a job with Morgan Stanley, PSR ¶24. In July

[1] *American Greed* is a "true crime" television series examining "the dark side of the American dream." *See* https://www.cnbc.com/american-greed/.

2000, Boye told Morgan Stanley that he had a "life-threatening illness" and was placed on medical leave. PSR ¶106. By 2001, Morgan Stanley had terminated Boye's employment and reported him to the New York Stock Exchange (NYSE) for, among other things, trading improprieties, providing inaccurate documents to his employer, and falsifying customers' signatures. PSR ¶¶108-112. In 2004, under the name "Bobby Ajiboye," Boye was found guilty of the charges, censured, and permanently barred from membership and employment or association with any member of the NYSE or the Securities and Exchange Commission. PSR ¶114.

After Morgan Stanley fired him, Boye received a second chance to redeem himself professionally with a company in Los Angeles -- 3-D Systems. 3-D Systems hired Boye as its global tax director in 2002. However, instead of committing himself to legitimate professional endeavors, Boye defrauded his employer yet again. PSR ¶¶76, 104. Boye was arrested and charged with thirteen counts of fraud and theft. PSR ¶76. He pleaded guilty in Superior Court of California, Los Angeles (under the name "Bobby Ajiboye"), to grand theft by embezzlement, money laundering, perjury, and filing a false or forged instrument. PSR ¶76. He was sentenced to three years in California state prison (but had the good fortune to serve his time in a halfway house for white-

collar offenders), followed by three years of parole, and ordered to pay over $400,000 in restitution. PSR ¶76.

B. Boye Obtains a New Job.

Boye received yet a third chance to apply his education and abilities in pursuit of an honest career. After being released from the California State Prison System in 2007, he moved to New Jersey. PSR ¶¶13, 76, 90. Despite his criminal past, using the name "Bobby Boye," he was admitted to the practice of law in New York State in 2010 and hired by the Kingdom of Norway to serve as an international petroleum legal advisor for the Ministry of Finance of the country of Timor-Leste. PSR ¶13. Neither Norway nor Timor-Leste was aware of Boye's criminal past. PSR ¶20.

Timor-Leste is located on the eastern half of an island that lies between Indonesia and Australia. A1496. Colonized by Portugal and, later, occupied by Indonesia and ravaged by civil war and unrest, it did not achieve independence until 2002. A1496-98. It has a population of 1.2 million and is one of the youngest and poorest nations in the world with a largely uneducated and unskilled populace. PSR ¶12; A1496. However, its economy continues to grow due to its vast petroleum resources; the oil and gas industry accounts for approximately 90% of the government's income. PSR ¶12; A1500. As part of its foreign aid and development program, Norway sponsored an international

petroleum development program, which assisted Timor-Leste in identifying, recruiting, and financing several advisors for its government. PSR ¶12; A1500.

As an international petroleum legal advisor, Boye was responsible for securing contracts with outside vendors for Timor-Leste's benefit. PSR ¶13. One of Boye's duties was to serve as one of three members of a bid selection committee, which reviewed and scored submitted bids for a $4.9 million contract to provide legal and tax accounting advice to Timor-Leste. PSR ¶¶14-15.

C. Boye Sees an Opportunity to Defraud His New Employer.

Undeterred by his three years in a California halfway house, Boye evidently saw yet another opportunity to cheat his employer and enrich himself. Boye exploited his position as a trusted legal advisor to Timor-Leste by steering the bid selection committee to award the $4.9 million bid to a shell company, which he secretly incorporated for the purpose of obtaining the contract. PSR ¶18. Boye's scheme worked, and Timor-Leste was duped into hiring his fake company, which he named "Opus & Best Legal Services LLC." A58.

Timor-Leste rejected other bids from well-known accounting and consulting firms and instead awarded the contract to Opus & Best based on Boye's recommendation and false representations contained in the bid

documents. PSR ¶¶17-18; A58-83. Naturally, Boye falsely claimed in the bid documents that Opus & Best had no conflicts of interest in undertaking the assignment. PSR ¶33; A1493. In reality, Boye was the sole beneficiary of the proposed $4.9 million contract.

Opus & Best purported to be a limited liability corporation organized under New York State Law. Opus & Best falsely claimed that it was founded in 1985, was "a multi-disciplinary corporation, prov[iding] legal, accounting, and economic services principally to the oil and gas sector," and was "registered as a legal and accounting services provider in Europe, Middle East, and Africa." PSR ¶28; A1479-80. The documents submitted to the bid review committee falsely described Opus & Best's purported "Relevant Consulting Experience in the last Five years/References" and claimed that the firm had provided consulting services to other sovereign nations. PSR ¶34; A1481-82. None of this was true. In fact, Boye incorporated Opus & Best in 2012 for the purpose of submitting the fraudulent bid to Timor-Leste. A1283. The company had never provided any services at all to anyone, much less to any international individuals, entities, or nations.

The firm purported to be staffed with "first class talent of attorneys, accountants, and economists." PSR ¶30. Boye created fictional bios for these professionals containing fake educational pedigrees and experience. A66-68.

Boye even set up a phony website for Opus & Best, which made many false claims about the credentials of the tax advisors, accountants, and economists who purportedly worked there. For example, the website claimed: "[o]ur professional tax advisors are simply the best in the business. We have over 40 top tax professionals, each with decades of high-level oil and gas tax/accounting experience spread out across the Americas, Middle East, Africa and South East Asia." A1427-28.

Opus & Best claimed to have ten attorneys and six accountants in its Oil & Gas Taxation Practice; three attorneys and two accountants in its Licensing Practice; five attorneys in its Oil & Gas Regulatory Matters Practice; twelve attorneys and three accountants in its Audit Defense, Accounting & Litigation Support Practice; six attorneys in its Legislation, Policy & Governmental Relations Practice; and ten attorneys and six accountants in its Mergers & Acquisitions Practice. A1481-86. Needless to say, because these purported attorneys did not actually exist, they were not licensed to practice law. And because the purported accountants did not exist, they did not hold certified public accounting licenses. PSR ¶¶31-32. Opus & Best employed no one other than Boye himself.

Once Timor-Leste awarded the contract to "Opus & Best," Boye diverted the contract payments to his own personal use. He was the sole

signatory on the bank account into which Timor-Leste transferred $3,510,000. PSR ¶¶37, 38, 40. Boye then used these funds to purchase for his personal use: five properties in New Jersey, totaling $1.6 million; a Bentley, a Range Rover, and a Rolls Royce, totaling $487,983; and two watches, totaling $20,000. PSR ¶41. In addition, Boye diverted approximately $850,000 in tax proceeds from Timor-Leste's petroleum fund to another company, which he himself controlled. PSR ¶23. He then used these funds to purchase his $1.9 million home in Franklin Lakes, New Jersey. PSR ¶50.

Approximately six months after Timor-Leste awarded the contract to "Opus & Best," Boye took a leave of absence from his job as an international petroleum legal advisor, claiming (as he had claimed to former employer Morgan Stanley) that he was suffering from a "life threatening illness." PSR ¶19. Timor-Leste learned Boye had no such illness, grew suspicious, conducted an investigation, and ultimately determined it had been defrauded. PSR ¶¶19, 42.

Even after leaving his position, Boye continued to attempt to defraud Timor-Leste by submitting an invoice for "final payment" of $630,000 from a fake Opus & Best employee, directing Timor-Leste to wire the money into an account secretly controlled by Boye. PSR ¶43. Boye also unsuccessfully tried to

get Timor-Leste to enter into an additional contract for $250,000 with an entity he called "Opus & Best Hong Kong." PSR ¶44.

Thanks to Boye's deception, Timor-Leste was not only defrauded on the $4.9 million contract and the approximately $850,000 in petroleum fund tax proceeds Boye diverted to himself, but the country expended an additional $979,000 to investigate and uncover Boye's fraud. PSR ¶59; A1503-04. Timor-Leste also suffered reputational harm. Because Opus & Best's work product was intended to generate a highly complex regulatory structure so that Timor-Leste could generate tax revenue from large international oil companies, Boye's scheme harmed the country's relationships with those companies, putting the country at risk of potential litigation or adverse negotiating positions for future contracts and tax arrangements. Further, Boye's sham hurt Timor-Leste's diplomatic relationship with Norway. A1500-01.

II. Procedural History

Boye was arrested on June 19, 2014, and charged in a seven-count complaint with wire fraud conspiracy and substantive counts of wire fraud. A1413-22. He was initially represented by retained counsel, A1409, but presumably when his funds ran out, the Court appointed Assistant Federal Public Defender K. Anthony Thomas for Boye, A1410.

A. The Plea Agreement and Plea Hearing

Boye agreed to plead guilty pursuant to a written plea agreement to a one-count information charging him with conspiracy to commit wire fraud. A1443. In exchange, the Government agreed to dismiss the remaining six counts and not initiate any other charges against him related to the scheme. A1443-44. In the plea agreement, the parties stipulated to an aggregate loss amount greater than $2,500,000, but not more than $7,000,000, resulting in an 18-level increase in the base offense level. A1452.[2] The parties also agreed that a two-level enhancement for abuse of a position of trust applied, as did a three-level downward adjustment for acceptance of responsibility. *Id.* The parties further agreed not to challenge the Guidelines range resulting from a total offense level of 24 and not to seek any departure or variance. A1453. Boye agreed to waive his right to appeal or collaterally attack the sentence if it fell within or below the total Guidelines range resulting from an offense level of 24. A1453. Boye also agreed to pay $3,510,000 in restitution to Timor-Leste, A1445, and agreed to the entry of a $4,233,015.42 forfeiture money judgment, A1446. As partial satisfaction of the forfeiture money judgment, he agreed to

[2] The parties and the Probation Office used the 2014 Guidelines manual. A1452; PSR ¶52.

forfeit several bank accounts, the Bentley, the Range Rover, and the Rolls Royce, two watches, and four properties. A1446-48.

At the plea hearing, the Court engaged in a colloquy with Boye to ensure that his guilty plea was intelligent, knowing, and voluntary. Boye admitted among other things, that he created Opus & Best for the purpose of bidding for the contract to provide Timor-Leste with legal and tax accounting advice. A1281. He admitted that he created a phony website which contained numerous misrepresentations, including false claims regarding the credentials and experience of fake attorneys, accountants and economists who practiced in the mining, oil, and gas sector. A1282-83.

The Probation Office determined that the total offense level applicable to Boye was the same as that stipulated to by the parties – level 24. PSR ¶64. This included an 18-level increase under U.S.S.G. § 2B1.1(b)(1)(J) for a loss of $4,369,706.30, which included the $3,510,000 which Boye illegally diverted from Timor-Leste and the over $850,000 in tax proceeds that Boye diverted to a company he controlled. PSR ¶55. The Probation Office determined that, with four criminal history points, Boye had a criminal history category of III. As a result, the Probation Office recommended a sentence within the range of 63 to 78 months. PSR ¶123.

B. Sentencing

At sentencing, defense counsel adhered to the parties' stipulations in the plea agreement regarding the offense level and prohibition on seeking variances therefrom. Defense counsel argued for a sentence at the bottom of the applicable range – 63 months – citing in mitigation the fact that Boye 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 the seized property and restitution. A1317-20, 1461. In response, the Government pointed out that the Sentencing Commission has "rejected the notion that a defendant should get credit for the value of services rendered where, as here, the 'case involv[es] a scheme in which . . . services were fraudulently rendered to the victim by persons falsely posing as licensed professionals[.]' " A1471 (citing U.S.S.G. § 2B1.1 cmt. n. 3(F)(v)(I)). The Government sought a sentence within the advisory range of 63 to 78 months. A1463.

The Court agreed with the offense level recommended by the Probation Office and stipulated to by the parties, resulting in the 63- to 78-month range. A1305-06. Judge Wolfson expressed concern that Boye used his skills and talents to create a sophisticated fraud, disguised his "one-man show" as a 40-person legal and accounting firm, preyed upon a vulnerable young country,

and demonstrated a pattern of deceptive and criminal conduct towards his employers which necessitated specific deterrence. A1338-42. The Court found that a sentence at the bottom of the range as requested by defense counsel would be insufficient and sentenced Boye instead to the middle of the range – 72 months in prison. The Court also imposed a three-year term of supervised release and ordered Boye to pay the stipulated restitution amount of $3,510,000 to Timor-Leste. [3] A1344-45.

C. Post-Sentencing Litigation

Boye filed a notice of direct appeal, which this Court dismissed by summary affirmance due to the appellate waiver in Boye's plea agreement. A1508. Boye thereafter filed a motion pursuant to 28 U.S.C. § 2255, not claiming innocence nor that his plea should be withdrawn, but rather that he should be resentenced to a lower sentence which reflected the value of the work he performed under the contract with Timor-Leste. A22.

[3] Attorneys for the victim, Timor-Leste, requested $5,478,875.30 in restitution. A1503. This amount included not only the $3,510,000 for the contract and the $850,000 for the tax proceeds, but also an additional $130,000, representing the salary it paid Boye and over $979,000, representing the amount the country paid to investigate and uncover Boye's fraud. PSR ¶59, A1503-04. Consistent with the plea agreement, both Boye's counsel and the Government objected to any claim for restitution above $3,510,000. PSR Addendum at p. 37; A1457. The Court declined to award any additional restitution over the amount agreed to by the parties. A1309, 1313.

Boye's § 2255 motion asserted three grounds for relief, each framed as ineffective assistance of counsel. First, he argued that his counsel was ineffective in advising him to assent to the plea agreement, which stipulated to an incorrect loss figure. Basically, Boye maintained that even though he had duped Timor-Leste into accepting his bid and posed as a coterie of licensed attorneys and accountants, as an attorney licensed in the State of New York, he had actually performed the work himself and hired a CPA to assist him. Boye claimed that AFPD Thomas was constitutionally ineffective because he did not negotiate a plea bargain with the government with a stipulated loss amount offset by the value of the work product he generated.

Second, he argued that his counsel was ineffective at sentencing because he did not argue for the application of U.S.S.G. § 2B1.1, Application Note 3(E)(i), which provides that loss "shall be reduced by … the services rendered, by 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 on the amount of loss for legal series he provided to Timor-Leste. Finally, Boye argued that his counsel was ineffective for not arguing for a lower restitution amount based on the fact that Timor-Leste received satisfactory legal services.

Judge Wolfson denied Boye's § 2255 motion. A2-17. First, the Court found that because both parties had stipulated to the loss amount in the plea agreement and agreed not to seek a sentence outside the Guidelines range that resulted, had counsel argued for a reduction or credit on that loss amount at sentencing, he would have breached the plea agreement, putting Boye at risk of a higher sentence. A11. Moreover, the Court found that Boye's loss theory was incorrect. Under § 2B1.1, a defendant's loss amount may be reduced by the value of the services rendered under Application Note 3(E)(i). But, there is an exception to that rule which provides that no credit may be provided on losses resulting from a defendant who falsely poses as a licensed professional. A12 (citing U.S.S.G. § 2B1.1, cmt. n. 3(F)(v)(I)). The District Court found that a "under a plain reading" of Application Note 3(F)(v)(I), Boye would not have been entitled to a credit for services rendered "because he impersonated a firm of licensed attorneys and accountants." A13. As a result, counsel's decision not to object to the loss amount at sentencing was not unreasonable.

Second, because Application Note 3(F)(v)(I) properly applied and Boye was not due any credit on the loss amount, the Court found that counsel could not have been deficient for entering into a plea agreement that stipulated to a loss amount without a credit for services rendered. A15. Finally, the District Court denied Boye's restitution claim, finding it not cognizable under 28

U.S.C. § 2255. A15. The Court then denied Boye a certificate of appealability. A17.

Boye filed a notice of appeal, A1, and this Court granted a limited certificate of appealability:

> 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.*

A18 (emphasis added).

SUMMARY OF ARGUMENT

Boye was not due a credit or offset from his loss amount under U.S.S.G. § 2B1.1 for the value of the services he rendered the victim by dint of Application Note 3(F)(v)(I), which is a special rule applicable to defendants who falsely pose as licensed professionals. Boye, however, argues that this Application Note does not apply to him. He claims that he did not falsely pose as a licensed professional because, in fact, he was licensed to practice law. Of course, this is too clever by half: Boye admitted to posing as an entire 40-employee firm of lawyers and accountants, none of whom actually existed or were licensed.

With this legal concept as the starting point, all of Boye's claims of ineffectiveness of counsel fail. Because this Application Note applied to Boye's conduct, the District Court was correct in agreeing with the recommendation of the Probation Office and the stipulation of the parties to apply an 18-level enhancement under § 2B1.1(b)(1)(J) because the loss amount was more than $2,500,000 and less than $7,000,000. Therefore, defense counsel was certainly not ineffective in negotiating a plea agreement which stipulated to that loss amount. Nor could defense counsel have been ineffective for standing by that stipulation at sentencing, lest he breach the plea agreement and thereby place his client in an adverse position.

Recognizing this logic, a panel of this Court did not grant Boye a certificate of appealability on his ineffectiveness of counsel at sentencing claim, but only on his claim regarding ineffectiveness in plea negotiations. Likewise, because Boye's claim that his counsel was ineffective in negotiating his restitution amount is not cognizable under 28 U.S.C. § 2255, the panel similarly excluded this claim from Boye's certificate of appealability. Nevertheless, Boye raises both of these excluded claims through the backdoor. Regardless, all three of Boye's ineffectiveness of counsel arguments – ineffectiveness in plea negotiations, ineffectiveness at sentencing, and ineffectiveness in negotiating the restitution amount – fail.

Moreover, were Boye to succeed on the only claim for which this Court has issued a certificate of appealability, he would not be entitled to the relief he presses on appeal – resentencing. Rather, he would be entitled only to a remand to the District Court for a hearing to determine whether counsel's supposed ineffectiveness during plea negotiations prejudiced him. If Boye carried that burden, he would be entitled to withdraw his guilty plea, placing the parties back in the position they were in before the plea agreement was negotiated. Boye could then try his luck at negotiating a more favorable agreement, which the Government would be disinclined to provide, or he

could go to trial. In other words, Boye's request that this Court order "a new sentencing hearing," DB49, should be denied.

ARGUMENT

I. Boye Cannot Establish That His Attorney Provided Ineffective Assistance During Plea Negotiations By Strategically Not Raising Meritless Arguments And Securing A Plea That Spared Him Additional Charges And a More Severe Sentence.

Standard of Review: On appeal of an order denying a § 2255 motion, this Court reviews a district court's legal conclusions *de novo* and factual findings for clear error. *United States v. Green*, 898 F.3d 315, 317 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1590 (2019).

To make out a claim of ineffective assistance of counsel during plea negotiations a petitioner must allege in his § 2255 motion that he either lost out on a more favorable plea bargain that would have resulted in a better sentence (*Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012)) or pleaded guilty rather than go to trial (*Lockhart v. Hill*, 474 U.S. 52 (1985)) because of his counsel's deficient performance.

Boye does not claim that but for his counsel's deficient performance, he would have gone to trial. Rather, in essence, Boye is arguing that he was entitled, under the Guidelines, to an off-set in his loss amount for the value of services he claims that he provided to Timor-Leste. Accordingly, Boye claims that Assistant Federal Public Defender Thomas was constitutionally ineffective for permitting him to stipulate to a loss amount of greater than $2,500,000, but not more than $7,000,000. And, in light of that ineffective representation, he contends that he is now entitled to be resentenced using a lower loss amount.

Boye's argument, however, falters at every step. Because he posed as an entire team of licensed attorneys and accountants, he is not entitled to any such loss off-set. Assistant Federal Public Defender Thomas, therefore, was not ineffective. And, even if such an argument could have been made, Boye has not shown that he would have gone to trial, received a more favorable plea deal, or have been better off pleading guilty without the benefit of a plea agreement. Boye's suggested remedy, too, then, is wrong. This Court, therefore, should reject Boye's claim.

Under § 2B1.1, the Sentencing Guideline governing the calculation of the offense level for crimes involving fraud, the offense level is largely determined based on loss amount with reference to a loss table under § 2B1.1(b)(1). Because the main text of the Guidelines do not further define "loss," this Court must turn to the application notes that accompany § 2B1.1, keeping "in mind that [G]uidelines commentary, interpreting or explaining the application of a guideline, is binding on us when we are applying that guideline because we are obligated to adhere to the Commission's definition." *United States v. Savani*, 733 F.3d 56, 62 (3d Cir. 2013) (citing *Stinson v. United States*, 508 U.S. 36, 43 (1993)). Loss is generally defined in Application Note 3 as the greater of actual loss or intended loss. U.S.S.G. § 2B1.1, cmt. n. 3(A).

In certain situations, Application Note 3 provides for exclusions from loss, credits against loss, and other "special rules." U.S.S.G. § 2B1.1 cmt. n. 3(D), (E), and (F). For example, under Note 3(E), a defendant may receive an off-set or credit towards his loss amount for the value of the services rendered by the defendant to the victim before the offense was detected. U.S.S.G. § 2B1.1 cmt. n. 3(E). But, no such off-set is available here due to the applicability of a "special rule" under U.S.S.G. § 2B1.1 cmt. n. 3(F).

Special rule 3(F)(v) applies to "Certain Other Unlawful Misrepresentation Schemes." U.S.S.G. § 2B1.1 cmt. n. 3(F)(v). Specifically, "[i]n a case involving a scheme in which … services were fraudulently rendered to the victim by persons falsely posing as licensed professionals … loss shall include the amount paid for the … services … rendered, or misrepresented, with no credit provided for the value of those … services." U.S.S.G. § 2B1.1 cmt. n. 3(F)(v). By specifically stating that "no credit" should be "provided for the value of" services provided by "persons falsely posing as licensed professionals," the Sentencing Commission, as this Court has found, intended to preclude any such credit. *See United States v. Nagle*, 803 F.3d 167, 182 (3d Cir. 2015) (distinguishing between 3(F)(ii) and (3)(F)(v) and noting that the language of the Application Note demonstrated that the Commission

did not intend to preclude crediting services rendered against loss for Note 3(F)(ii)).

The Sentencing Commission explained the purpose of special rule 3(F)(v)(I) in its 2001 amendments to the definition of loss under U.S.S.G. § 2B1.1:

> The definition of "loss" also provides special rules for certain schemes. One rule includes in loss (and excludes from crediting) the benefits received by victims of persons fraudulently providing professional 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. *See United States v. Maurello,* 76 F.3d 1304 (3d Cir. 1996) (calculating loss by subtracting the value of satisfactory legal services from amount of fees paid to a person posing as a lawyer); and *United States v. Reddeck,* 22 F.3d 1504 (10th Cir. 1994) (reducing loss by the value of education received from a sham university). 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. In addition, this provision eliminates the additional burden that would be imposed on courts if required to determine the value of these benefits.

United States Sentencing Commission, Notices, 66 F.R. 30512–01, 30544, 2001 WL 606866 (June 6, 2001). Thus, the application note, which became effective in 2001,[4] was designed to combat the special kind of manipulation

[4] Application Note 3(F)(v) took effect in November 2001. U.S. Sentencing Guidelines Manual app. C, vol. II, amend. 617, at 186 (2003).

and abuse of trust that occurs when a criminal poses as a licensed professional. *See, e.g., United States v. Aronowitz*, 151 F. App'x 193, 194 (3d Cir. 2005) (not precedential) (applying Note 3(F)(v)(I) to licensed dentist who allowed his dental assistants to perform root canals and noting that 2001 amendment reversed case law which had previously permitted exclusion from the loss amount for the value of services provided by defendant).

Here, Boye did not "falsely pos[e]" as just one "licensed professional[ ]." U.S.S.G. § 2B1.1 cmt. n. 3(F)(v)(I). He falsely posed as many. For example, he claimed in the bid documents that the following non-existent people would serve on the Opus & Best project team for Timor-Leste:

> • "Dominic Lucas," an "Attorney & CPA," was "the leader" of the Timor-Leste project. He was a graduate of the University of Southern California and Yale University and headed the "oil and gas tax practice at Opus & Best." He previously "practiced tax and accounting for over 20 years" and was "employed by the IRS' oil and gas section" and had been a partner in the oil and gas practice of a private law firm.
>
> • "Raymond S. Weils," an "Attorney & CPA," was a graduate of Aberdeen University with an M.B.A. from Wharton and over 18 years of mining tax and accounting experience with an oil company and as a corporate tax attorney.
>
> • "Elizabeth Ackerman," an Attorney, was a graduate of Duke University and UCLA Law School who, prior to joining Opus & Best, headed the oil and gas practice at a law firm and had 25 years of oil and gas practice.

> • "Michelle Harrison" was "an economist and a certified accountant with 15 years of experience in the oil and gas industry." She was a graduate of Pepperdine University, had a master's degree in finance from the University of Southern California, and a Ph.D. in Economics from the City University of New York.
>
> • "Paul Davis" was an attorney who had been involved with several oil and gas projects with Opus & Best since 2006, was a graduate of New York University Law School and had an LLM from the University of London.
>
> • "Rebecca Samuelson" was an accountant who was a tax accounting specialist and a graduate of Brown University.

A1487-89. None of these people existed and, therefore, none of them were licensed to practice law or accounting. Through the use of a fictitious webpage, fictitious email addresses, and fraudulent documents, Boye posed as a legitimate 40-employee "legal services" firm staffed with lawyers and accountants with 20 and 30 years of experience in the area of petroleum taxation who had purportedly worked for the IRS, big accounting firms, and prominent law firms. In fact, he was the only member of Opus & Best.

Consistent with Application Note 3(F)(v)(I), the parties' plea negotiations here did not contemplate credit against Boye's loss amount for the purported value of the services he provided Timor-Leste while posing as an entire firm of experienced licensed professionals. Therefore, defense counsel's

failure to secure such a credit against the loss in Boye's plea agreement cannot be deemed ineffective.

Boye, however, claims that Application Note 3(F)(v)(I) cannot apply to him because he was not "posing" as an attorney; he actually is an attorney. DB22. However, the fact that Boye was licensed to practice law in the State of New York during the time period when he engaged in this fraud does not render Note 3(F)(v)(I) inapplicable, given that he *falsely posed as an entire 40-member firm full of experienced attorneys and accountants*.

Similarly, the fact that he claims he sub-contracted work to one or two independent contractors, like Peter Chen, purportedly an attorney and CPA, DB25, does not render Note 3(F)(v)(I) inapplicable. Again, he did not represent to Timor-Leste that he was hiring Peter Chen as an independent contractor to work on the contract. Rather, Boye posed as an entire firm of CPAs and attorneys, none of whom were Boye or Chen.

Boye claims that a different application note applies to him: U.S.S.G. § 2B1.1, cmt. n. 3(E). Note 3(E) provides that the loss amount "shall be reduced" by the amount of the "fair market value" of the "services rendered" by the defendant. But, Boye is incorrect. Note 3(E) does not apply, given that Boye's conduct in this case falls under 3(F)(v)(I). Thus, he was not entitled to

any credit against the loss amount for the value of services he provided under the contract.

The cases Boye cites for the principle that Note 3(F)(v)(I) is inapplicable and that he ought to be due a credit under Note 3(E) for the value of the services rendered are inapposite. For example, some of the case law he cites to argue that Note 3(E), and not 3(F)(v)(I), applies were decided *before* the 2001 amendment to § 2B1.1 which created 3(F)(v)(I). *See* DB18-20 (citing *United States v. Dickler*, 64 F.3d 818, 825 (3d Cir. 1995), *United States v. Nathan*, 188 F.3d 190 (3d Cir. 1999), and *United States v. Sublett*, 124 F.3d 693, 694 (5th Cir. 1997)). In fact, the 2001 amendment to § 2B1.1 essentially overruled cases that would have required exactly what Boye wants here: the valuation of satisfactory work completed by a fake licensed professional. The amendment makes such a valuation unnecessary in the case of a defendant like Boye who has falsely posed as a licensed professional.

United States v. Nagle, 803 F.3d 167 (3d Cir. 2015), which is also cited by Boye, DB18, declined to address Note 3(F)(v) because it was raised for the first time at oral argument. *Nagle*, 803 F.3d at 182 n.8. And *United States v. Foster*, 728 F. App'x 112, 115 (3d Cir. 2018) (not precedential), cited at DB18, is also inapposite. In that case, neither of the co-conspirators posed as licensed professionals. *Id.*

Boye cites *United States v. Allen*, 529 F.3d 390 (7th Cir. 2008), DB26, for the proposition that if the services provided do not require a professional license, then Note 3(F)(v)(I) does not apply. There, Allen held himself out as an expert microbiologist in the field of mold remediation. *Allen*, 529 F.3d at 396. The Seventh Circuit found that Allen's conduct did not fall under Note 3(F)(v)(I) because the "profession in which he was scheming was not a licensed one." *Id.* at 397. Allen never claimed to be a licensed professional, and the state of Wisconsin does not license microbiologists. *Id.* Therefore, "there was no license that he could have pretended to possess." *Id.* As a result, *Allen* is distinguishable from this case.[5]

Although Boye is correct that the request for bids from Timor-Leste did not *explicitly* contain a licensing requirement, the nature of the work sought made it clear that it was a prerequisite. After all, it sought legal and accounting

[5] The other credit against loss cases cited by Boye are similarly distinguishable, DB27, and none contain any discussion of Application Note 3(F)(v)(I): *United States v. Martin*, 796 F.3d 1101 (9th Cir. 2015) (case involved "government benefits" rule of Application Note 3(F)(ii) and "regulatory approval rule" of Application Note 3(F)(v)(II)); *United States v. Hausmann*, 345 F.3d 952, 959-60 (7th Cir. 2003) (lawyer was not entitled to credit against losses for free services he provided to clients because he provided those services to all clients, not just the ones he defrauded); *United States v. Brownell*, 495 F.3d 459 (7th Cir. 2007) (remanding for determination by sentencing court whether construction manager should get credit against loss for repaying fraudulent loan where it appeared he might have known the fraud was about to be discovered).

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. A57.

Besides that obvious clue that Timor-Leste expected licensed professionals to do its legal and accounting work, Boye's actions confirm this straightforward reading. As Boye admitted during his plea colloquy, he created Opus & Best Legal Services for the purpose of bidding for the contract to provide Timor-Leste with "legal and tax accounting advice." A1281. He also made sure that his fake project team was staffed with a phalanx of highly credentialed pretend licensed attorneys and accountants. Boye's extensive bid documents falsely demonstrated that his "Legal Services" firm met the bid's legal, regulatory, and accounting requirements. A58-83. Boye's bid proposal did not mention his name, law license or legal experience, nor the names, licenses or experience of the one or two CPAs he purportedly hired as independent contractors.

Timor-Leste rejected other bids from well-known accounting and consulting firms and instead awarded the contract to Opus & Best believing it to be what it purported to be: a 40-member firm of licensed lawyers and accountants, who would staff the Timor-Leste project with a specially

designated team of lawyers and accountants with the requisite experience for the contract. It is unlikely that Timor-Leste would have entrusted this large of a project to such a small, unproven firm or to a firm with no licensed professionals on its staff. Therefore, Boye's claim that no licensing was required by the bid solicitation or contract is incongruous.

While there is a paucity of case law discussing Note 3(F)(v)(I), those cases that do, cited by Boye at DB24, 26, are straightforward and certainly do not suggest that one attorney posing as an entire firm of licensed attorneys and accountants does not fall within the Note's ambit. *See, e.g. United States v. Bennett*, 453 F. App'x 395, 397 (4th Cir. 2011) (unpublished) (pursuant to Note 3(F)(v)(I), no credit for value of services provided by defendant impersonating one doctor); *United States v. Kieffer*, 621 F.3d 825, 834 (8th Cir. 2010) (pursuant to Note 3(F)(v)(I), no credit for value of services provided by defendant impersonating one attorney); *United States v. Hunter*, 618 F.3d 1062, 1065 (9th Cir. 2010) (pursuant to Note 3(F)(v)(I), no credit for value of services provided by defendant impersonating one nurse).

Consistent with Application Note 3(F)(v)(I), the parties' plea negotiations here correctly did not contemplate credit against Boye's losses for the purported value of the services he provided Timor-Leste while posing as an entire firm of experienced licensed professionals. Therefore, counsel's failure to

secure such a credit against the loss in Boye's plea agreement cannot be deemed ineffective because properly interpreting an application note in the Guidelines does not fall below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 688 (1984); *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999) ("There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument"). Accordingly, Boye cannot satisfy the *Strickland* standard as to counsel's performance during the plea process.

Should this Court disagree and find that Boye's counsel, the Government, the Probation Office and the District Court all misapprehended Application Note 3(F)(v)(I) and ought to have given Boye credit for the value of the services he provided, then, at best, Boye would be entitled to a remand to the District Court for a hearing on the issue of counsel's ineffectiveness during plea negotiations. He would *not* be entitled to the resentencing he seeks.

To make out an ineffective assistance claim that "poor bargaining" resulted in a "heavier sentence," a petitioner must show a reasonable probability that, absent counsel's deficient performance, he would have had a different outcome, *i.e.*, he might have negotiated a better plea deal, or gone to trial, or pleaded open. *See Rodriguez-Penton v. United States*, 905 F.3d 481, 488-89 (6th Cir. 2018); *United States v. Swaby*, 855 F.3d 233, 241 (4th Cir. 2017);

United States v. Rodriguez-Vega, 797 F.3d 781, 788–89 (9th Cir. 2015); *Kovacs v. United States*, 744 F.3d 44, 52-53 (2d Cir. 2014). That, in turn, means the petitioner must show a reasonable probability that the prosecution would actually have agreed to, and the court would have approved, the hypothetical "better plea" the petitioner faults counsel for failing to pursue. *Rodriguez-Vega*, 797 F.3d at 788–89 ("A petitioner may demonstrate that there existed a reasonable probability of negotiating a better plea by identifying cases indicating a willingness by the government to permit defendants charged with the same or a substantially similar crime to plead guilty to a non-removable offense."); *Kovacs*, 744 F.3d at 52 ("[T]he ultimate outcome of a plea negotiation depends on whether the government is willing to agree to the plea the defendant is willing to enter.") (internal quotations and citations omitted).

Boye has not even attempted to show a reasonable probability that, absent counsel's supposedly deficient performance, he could have negotiated a better deal. Nor has he attempted to show that he was prejudiced, *i.e.*, that there is a reasonable probability that the government would have agreed to, and the court would have accepted, a different bargain that included terms more favorable to him. *Rodriguez-Vega*, 797 F.3d at 788–89; *Kovacs*, 744 F.3d at 52–53.

It may prove difficult on remand for Boye to show that he could have negotiated a better deal or would have been better off with no deal at all, given that he benefitted from his plea agreement in several respects. First, he avoided liability on six counts, which the government agreed to dismiss. The Government further agreed not to initiate any other charges against him related to the scheme. A1443-44.

Second, Boye's loss amount did not specifically include his intended loss under Application Note 3(A)(ii) (*i.e.*, the full value of the $4.9 million contract), his $130,000 salary, the additional $250,000 he attempted to defraud the country in a new contract with a different fake firm, or the $979,000 in expenses Timor-Leste spent in uncovering the fraud.[6] *See, e.g., United States v. DeRosier*, 501 F.3d 888, 895-96 (8th Cir. 2007) (the amount of victim bank's attorney fees, legal fees, and other employee costs related to the investigation of defendant were properly included in loss amount because investigation was

[6] Even aggregated, however, these losses would not have bumped Boye into a higher offense level under § 2B1.1(b)(1) because they do not rise above $7 million. Nevertheless, on remand, to demonstrate how he would have done better absent counsel's deficient performance, Boye would need to prove enough credit against his losses to lower the loss amount below $2,500,000 in order to secure a lower offense level in the § 2B1.1 loss table and, hence, a lower sentencing range.

in immediate response to fraudulent conduct and not incurred primarily to aid government).

Third, Boye did not receive a two-level enhancement for "sophisticated means" under U.S.S.G. § 2B1.1(b)(10), despite, as the District Court noted at sentencing, a "quite sophisticated" scheme which involved fictitious entities and shell companies. A1338. *See* U.S.S.G. § 2B1.1(b)(10), cmt. n. 9(B) (adjustment appropriate where conduct shows greater level of planning or concealment than typical fraud, such as through hiding assets or transactions, the use of fictitious entities or corporate shells); *see also United States v. Fumo*, 655 F.3d 288, 315 (3d Cir. 2011) (use of "sham entities" "to conceal the flow of funds" supports sophisticated means enhancement). If Boye had stipulated to a sophisticated means enhancement, his offense level would have been 26 and his range 78 to 97 months, a fair degree higher than the 63- to 78-month range which his counsel secured for him.

Further, by entering into this plea agreement, Boye avoided any upward departure motions or variance arguments by the Government, A1453, such as for causing substantial non-monetary harm under U.S.S.G. § 2B1.1, cmt. n. 20(A)(ii), causing harm to the victim's reputation under U.S.S.G. § 2B1.1, cmt. n. (20)(A)(vi)(I), or based on the vulnerability of Timor-Leste. The

Government also agreed to waive its right to appeal his sentence within or above the stipulated Guidelines range. A1453.

Finally, Boye may have also benefitted from the restitution and forfeiture stipulations in his plea agreement, which were lower than what the victim sought, what the Probation Office recommended, and what the District Court arguably might have imposed. The restitution amount might have totaled over $5.4 million had Boye been held accountable for: the $3,510,000 he diverted under the contract; the $859,706 in tax proceeds he diverted (which was part of a scheme prior to the time period of the charged conspiracy); the $130,000 salary Timor-Leste paid Boye; and the $979,000 in investigative, auditing and legal services Timor-Leste incurred in uncovering the fraud. *See* 18 U.S.C. § 3663A(b)(4) (Mandatory Victims Restitution Act provides that investigative costs and attorneys' fees may qualify as "other expenses incurred during participation in the investigation or prosecution of the offense"). Instead, Boye benefitted from the plea agreement, which capped his restitution at $3,510,000. Further, Boye's counsel argued for a sentence at the bottom of the range, based, in part, on Boye's commitment to pay restitution and his voluntary forfeiture of properties, cars, and watches. In fact, through his prior counsel's efforts, it may be shown on remand that Boye avoided a more severe sentence.

In addition, to be successful on remand, Boye would need to demonstrate that the United States likely would have agreed to a stipulation waiving the application of Note 3(F)(v)(I). In fact, the United States was not obligated to plea bargain with Boye at all. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). Nor must the government offer any particular terms in the plea offers it chooses to make. *See United States v. Yahsi*, 549 Fed. Appx. 83, 85 (3d Cir. 2013) (non-precedential). As the Supreme Court has expressly recognized, "a defendant has no right to be offered a plea" at all, let alone a plea with specific terms. *Missouri v. Frye*, 566 U.S. 134, 136 (2012).

But, even assuming Boye prevails on appeal on his legal challenge to the applicability of Note 3(F)(v)(I) and this Court remands to the District Court for a hearing to determine whether counsel was ineffective in plea negotiations, and assuming Boye successfully demonstrates ineffectiveness and prejudice, at best, he would be entitled to withdraw his guilty plea and re-commence plea negotiations, plead open, or go to trial. He would not be entitled to the re-sentencing he now seeks in this appeal.

II. Boye's Backdoor Claims That Counsel Was Ineffective at Sentencing and in Negotiating His Restitution Figure Are Not Authorized Under the Certificate of Appealability and Should be Dismissed.

> ***Standard of Review:*** A certificate of appealability is required to appeal from the denial of a § 2255 motion. Absent a certificate of appealability, this Court lacks jurisdiction over an appeal, which then must be dismissed. *United States v. Cepero,* 224 F.3d 256, 267 (3d Cir. 2000).

Despite the limited Certificate of Appealability in this case, Boye continues to argue before this Court that his counsel was ineffective at sentencing, DB19, 46, and ineffective in advising him on restitution, DB28-35. The Certificate of Appealability issued by this Court states:

> 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.*

A18 (emphasis added). Accordingly, this Court authorized Boye to raise one claim and one claim only on appeal: whether his counsel was ineffective in 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 provided. This Court denied Boye's requests to raise his two other claims, which he argued before the District Court: whether defense counsel was ineffective at sentencing and

in negotiating his restitution amount. As a result, this Court should dismiss these portions of this appeal for lack of jurisdiction. *United States v. Cepero*, 224 F.3d 256, 267 (3d Cir. 2000).

A. Counsel Was Not Ineffective At Sentencing Because He Abided By the Stipulations Contained in the Plea Agreement.

Even if this Court were to entertain Boye's claim that his counsel was ineffective at sentencing, Boye cannot establish ineffectiveness. "[I]f there is no legal basis for the petitioner's claimed entitlement to a reduction in sentence, it necessarily follows that [petitioner's] counsel was not ineffective." *United States v. Sanders*, 165 F.3d 248, 251 (3d Cir. 1999). Petitioner cannot have suffered prejudice "based on an attorney's failure to raise a meritless argument." *Id.* at 253.

For the reasons the District Court explained: "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)(I)(J) applies because the aggregate loss amount is greater than $2,500,000 but not more than $7,000,000." A11. For the reasons discussed above, Boye's claim that the credit exclusion under Note 3(F)(v)(I) for impersonating licensed professionals does not apply is meritless. As Judge Wolfson found, because Note (3)(E)(1) (the credit against

loss rule) was not applicable, counsel was not deficient in advising Boye to stipulate to the loss amount without a credit.

Boye cannot show that counsel was deficient at sentencing for choosing not to backpedal from the parties' correctly stipulated loss range by challenging the lawful applicability of the credit exclusion. Had Boye's counsel done so, he would have breached the plea agreement, which this Court has held is an enforceable contract as much against the defendant as it is against the Government. *See United States v. Williams*, 510 F.3d 416, 427-28 (3d Cir. 2007). A defendant cannot "get the benefits of [his] plea bargain, while evading the costs ... and contract law would not support such a result." *Id.* As a result, this Circuit has held that the applicable remedy for a breach of a plea agreement by defense counsel is specific performance, and the defendant must be resentenced under the terms of his plea agreement by a different district judge than the one who presided over the original sentence. *See id.; see also United States v. Erwin*, 765 F.3d 219, 231 (3d Cir. 2014).

Boye's experienced defense counsel, an Assistant Federal Public Defender, surely knew better than to breach the plea agreement and potentially expose his client to a higher sentence merely in order to argue for a credit against loss that was not legally valid under this set of facts. Rather than breach the plea agreement, defense counsel wisely argued for mitigation of Boye's

sentence under the 18 U.S.C. § 3553(a) factors, noting that Boye provided work product for Timor-Leste, and Timor-Leste did not complain about the quality of that work. A1318-20.

Nor, therefore, was counsel deficient for not submitting to the District court at sentencing copies of the work performed by Boye while impersonating the firm "Opus & Best," *see* DB19, since there was no legally viable basis for arguing that the value of the work product (even if quantifiable) could be used to off-set the loss or the restitution owed to Timor-Leste.

Accordingly, Boye cannot establish that defense counsel was ineffective for failing to pursue this credit against loss argument at sentencing. *Sanders*, 165 F.3d at 251.

B. Boye's Claim That Counsel was Ineffective in Negotiating the Restitution Amount Is Not Cognizable Under § 2255.

Even if this Court were to entertain Boye's claim that his counsel was ineffective in negotiating his restitution amount, this claim is not cognizable under 28 U.S.C. § 2255. Boye argues defense counsel was deficient for not arguing for a lower restitution amount to reflect credit for the value of the services he provided to Timor-Leste. DB29. However, the District Court correctly determined that this claim is not cognizable under § 2255. For this

reason, this Court's certificate of appealability precludes Boye from raising this claim on appeal.

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)). This Court 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. *See 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). "[A] challenge to a restitution order brought under the guise of an ineffective assistance of counsel claim is also not cognizable as a habeas petition because it does not seek relief from custody." *Trimble*, F. Supp. 3d at 746; *see also Shephard v. United States*, 735 F.3d 797, 798 (8th Cir. 2013); *Kaminski v. United States*, 339 F.3d 84, 85 n. 1 (2d Cir. 2003); *United States v. Thiele*, 314 F.3d 399, 402 (9th Cir. 2002); *Smullen v. United States*, 94 F.3d 20, 26 (1st Cir. 1996); *United States v. Segler*, 37 F.3d 1131, 1137 (5th Cir. 1994).

In any event, Boye cannot claim that he suffered prejudice as a result of following defense counsel's advice to agree to a restitution amount that

reflected the actual monetary loss to Timor-Leste. In fact, as explained further above, the restitution amount might have totaled over $5.4 million had Boye been held accountable for all of the indirect and direct costs incurred by Timor-Leste. However, Boye benefitted from the plea agreement, which capped his restitution at $3,510,000. Moreover, defense counsel strategically used the fact at sentencing that Boye was ready, willing, and able to pay restitution and agreed to an amount of forfeiture, which was higher than the restitution amount to argue in mitigation for a sentence at the bottom of the Guidelines range. A1313.

CONCLUSION

For all these reasons, Petitioner's motion should be denied with regard to his claim of ineffective assistance of counsel during plea negotiations and dismissed with regard to his sentencing and restitution claims, which exceed the scope of this Court's certificate of appealability.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify as an Assistant United States Attorney for the District of New Jersey that:

1. this brief contains 9,218 words, thereby complying with the length limitations of Fed. R. App. P. 32(a)(7);

2. this brief complies with the typeface requirements and type style requirements of Fed. R. App. P. 32(a)(5) and (6) by using Microsoft Word 2016's 14-point proportionally-spaced Calisto MT typeface;

3. the text of the PDF and paper copies of the brief is identical; and

4. the PDF copies of the brief were prepared on a computer automatically protected by a continuously-updated version of McAfee Endpoint Security 10.2 and no virus was detected.

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Appeals Division

Dated: August 22, 2019

CERTIFICATION OF FILING AND SERVICE

I hereby certify that on August 22, 2019, I caused the Brief for Appellee to be filed with the Clerk of this Court by (a) electronic filing in the PDF form using the Circuit's electronic filing system, and (b) paper filing of an original and six paper copies of the Brief using postage-prepaid first-class mail.

I also certify that on August 22, 2019, I caused the Brief for Appellee to be served:

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