No. 07-11558-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RAMIRO RAMOS,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF THE UNITED STATES AS RESPONDENT-APPELLEE

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Ramos v. *United States*
No. 07-11558-JJ

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for the United States hereby certifies, in accordance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, that the following persons may have an interest in the outcome of this case:

1. R. Alexander Acosta, United States Attorney
2. Grace Chung Becker, Acting Assistant Attorney General, Civil Rights Division, United States Department of Justice
3. Andrew Huang, United States Department of Justice, Trial Counsel for the Government
4. Robert B. Kurzweil, United States Department of Justice, Trial Counsel for the Government
5. Honorable Michael Moore, United States District Court Judge
6. Lorenzo J. Palomares, previous Appellate counsel for defendants
7. Joaquin Perez, previous Trial and Appellate Counsel for Ramiro Ramos
8. Juan Ramos, Co-Defendant
9. Ramiro Ramos, Petitioner-Appellant

10. Anne Ruth Schultz, Assistant United States Attorney

11. Jessica Dunsay Silver, United States Department of Justice, Appellate Counsel for the Government

12. Lisa J. Stark, United States Department of Justice, Appellate Counsel for the Government

13. Daniel Velez, United States Department of Justice, Trial Counsel for the Government

14. Adrianna Vieco, United States Department of Justice, Trial Counsel for the Government

15. William Carter White, Assistant United States Attorney

STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument is necessary.

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SUBJECT MATTER AND APPELLATE JURISDICTION

On May 5, 2005, this Court affirmed petitioner's sentence. *United States* v. *Ramos*, 130 F. App'x 415 (11th Cir. 2005). The Supreme Court denied petitioner a writ of certiorari on October 3, 2005, *Ramos* v. *United States*, 546 U.S. 876, 126 S. Ct. 388 (2005), and rehearing on January 9, 2006, *Ramos* v. *United States*, 546 U.S. 1133, 126 S. Ct. 1136 (2006).

On June 16, 2006, petitioner filed a timely *pro se* motion in the district court pursuant to 28 U.S.C. 2255. On March 7, 2007, the district court denied petitioner's motion without a hearing. On April 2, 2007, petitioner filed a timely notice of appeal and a motion requesting a certificate of appealability. On April 9, 2007, the district court denied petitioner's motion. On January 31, 2008, this Court issued an order construing petitioner's notice of appeal as a motion for a certificate of appealability and granted petitioner permission to appeal the below-stated issue.

STATEMENT OF THE ISSUE

Whether the district court erred in finding that counsel was not ineffective for pursuing petitioner's first direct appeal after failing to recognize a calculation error in the original presentence investigation report that, when corrected at resentence, resulted in a higher sentence.

STATEMENT OF THE CASE

This case arises as a result of petitioner's convictions and sentence for conspiracy to hold hundreds of poverty stricken, uneducated illegal aliens in involuntary servitude and to harbor those workers in deplorable conditions. See *United States* v. *Ramos*, 02-16478-AA (11th Cir. Sept. 26, 2003) (*Ramos I*) (Attachment A). In this, his third appeal, petitioner, proceeding *pro se* and

pursuant to 28 U.S.C. 2255, alleges that his original appellate counsel was ineffective and violated his Sixth Amendment rights by failing to recognize and/or advise him at the time of his first appeal that were his case remanded for resentencing, he likely would receive a higher sentence than he initially received.

Prior Proceedings

1. On October 18, 2001, a federal grand jury sitting in the Southern District of Florida returned a four-count superceding indictment charging petitioner, Ramiro Ramos, along with his brother Juan Ramos and cousin Jose Ramos (01-R. 72).[1] The indictment charged petitioner with conspiracy to keep migrant workers in involuntary servitude, commit extortion, and harbor illegal aliens, in violation of 18 U.S.C. 371 (Count One); extortion in violation of the Hobbs Act, 18 U.S.C. 1951(a) (Count Two); use of a firearm during a crime of violence (Count Two) in violation of 18 U.S.C. 924(c)(1)(a) (Count Three); and harboring illegal aliens in violation of 18 U.S.C. 1324(a) (Count Four). Petitioner, who was represented by

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[1] "01-R. __" refers to the record number listed on the district court docket sheet for petitioner's underlying criminal case that resulted in petitioner's convictions and sentence. *United States* v. *Ramos*, No. 01-cr-14019-KMM (S.D. Fla.). "06-R. __" refers to the record number listed on the district court docket sheet for the civil case that originated with petitioner's filing a motion pursuant to 28 U.S.C. 2255. *Ramos* v. *United States*, No. 06-cv-14162-KMM (S.D. Fla.). "C.A.-R. __" refers to the record number listed on this Court's docket sheet for this appeal. *Ramos* v. *United States*, No. 07-11558-JJ (11th Cir.). "Br. __" refers to petitioner's *pro se* brief filed with this Court in this appeal.

Mr. Joaquin Perez, was tried by a jury and convicted on all counts (01-R. 229).[2]

On November 20, 2002, the district court sentenced petitioner (01-R. 282). Prior to imposing sentence, the district court refused to consider objections to the presentence report (PSR) filed by the defense and government because the court considered them untimely (01-R. 273, 275, 277). The district court, adopting the PSR's recommendation, sentenced petitioner to imprisonment for a term of 63 months on Counts One, Two and Four and 84 months of Count Three, to run consecutively, or 147 months on all counts (01-R. 282, 291).[3] In so doing, the district court erred by failing to rely on the count with the highest overall offense level, Count Four (harboring illegal aliens), to calculate petitioner's base offense level. Government counsel did not detect the error at the time (01-R. 277). The day after the sentencing, petitioner's trial counsel filed a notice of appeal.

2. Petitioner, his brother, and his cousin retained private counsel, Mr. Lorenzo J. Palomares, to represent them on appeal. Counsel filed a brief

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[2] Petitioner's brother was also convicted as charged on Counts One through Four. In addition, petitioner's cousin was convicted on Counts One, Two, and Three (01-R. 230, 231).

[3] The district court also ordered petitioner to pay a fine and restitution in the amount of $15,000 and $675, respectively, and in accordance with a special jury verdict finding forfeit proceeds, property, vehicles, and shares of stock from the commission of Counts One and Four in the amount of $3,046,093.57 (01-R. 233, 282). The forfeiture, fine and restitution are not at issue in this appeal.

challenging all of their convictions, as well as the district court's forfeiture order. See Appellant's Consol. Initial Br., *United States* v. *Ramos*, No. 02-16478-AA, 2003 WL 22964121 (11th Cir. Apr. 29, 2003). As a result of the recent Supreme Court decision in *Scheidler* v. *NOW*, 537 U.S. 393, 401, 123 S. Ct. 1057, 1064 (2003), the United States, in its brief as appellee, requested *sua sponte* that all the Hobbs Act related convictions be reversed. See Brief of the United States as Appellee, *United States* v. *Ramos*, No. 02-16478-AA, 2003 WL 22964122, at *6 (11th Cir. May 6, 2003).[4] The government's request was unrelated to any claims raised by the defense.

This Court rejected all the defense claims in an unpublished written decision. See *Ramos I*, 02-16478-AA (11th Cir. Sept. 26, 2003) (Attachment A). In accordance with the government's request, it vacated Counts Two and Three and that portion of Count One relating to conspiracy to commit extortion. The Court affirmed the remaining portion of the Count One and Count Four

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[4] In *Scheidler*, the Supreme Court held that abortion opponents "who interfered with, and in some instances completely disrupted, the ability of the" property owners to exercise their property rights "did not commit extortion [within the meaning of 18 U.S.C. 1951] because they did not 'obtain' property [from the victims] as required by the Hobbs Act." *Scheidler*, 537 U.S. at 401, 123 S. Ct. at 1064; *id.* at 397, 1061.

convictions. In light of the vacated counts, the Court remanded the case for petitioner and his brother to be resentenced.[5]

3. On remand, the district court ordered a new PSR in preparation for petitioner's resentencing. In contrast to the PSR prepared for the original sentencing, the new PSR relied on Count 4 (harboring illegal aliens) to calculate petitioner's base offense level. It also added various adjustments, including a two-level adjustment for obstruction of justice, and recommended an overall offense level that was nine levels higher than it had urged in petitioner's original PSR. See *United States* v. *Ramos*, 130 F. App'x 415, 418 (11th Cir. 2005), cert. denied, 546 U.S. 876, 126 S. Ct. 388 (2006) (*Ramos II*).

On March 1, 2004, the district court sentenced petitioner. Petitioner was represented by Mr. Perez because his appellate counsel, Mr. Palomares, whom he preferred, was unavailable (06-R. 13 at 24-25). Prior to imposing sentence, the district court rejected defense counsel's objections to the new PSR, adopted the calculations contained in the new report, and granted the government's request for a four-level adjustment for petitioner's leadership role, which it had refused to consider at petitioner's original sentencing. *Ramos II*, 130 F. App'x at 419. So

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[5] Because all of petitioner's cousin's (Jose Ramos) counts of conviction were vacated, he was released.

adjusted, the sentence would have exceeded the statutory maximum as to both counts. As a result, the district court sentenced petitioner to a term of imprisonment totaling 180 months, 60 months on Count One and 120 months on Count Four, the sentences to run consecutively (01-R. 359).[6]

4. Petitioner, represented by Mr. Perez, appealed his sentence. This Court affirmed in an unpublished opinion. See *Ramos II*, 130 F. App'x 415. It held that petitioner's sentence was correctly calculated, was not vindictive, and that petitioner was not entitled to a shorter sentence on remand just because two of his convictions were vacated. *Ibid*.

5. On June 16, 2006, petitioner filed a *pro se* motion pursuant to 28 U.S.C. 2255 (06-R. 1). Petitioner alleged that during his trial, original sentencing, first appeal, resentencing, and second appeal, Mr. Perez and Mr. Palomares denied him his Sixth Amendment right to the effective assistance of counsel, and he requested a hearing (06-R. 1). Petitioner contended that representation by both counsel was deficient for a multitude of reasons. Of relevance here was the contention that Mr. Palomares, his appellate counsel during his first appeal, "did not advise [him] to either decline to file a Notice of Appeal and/or to dismiss the first direct appeal

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[6] The district court also reinstated the forfeiture order and ordered defendant to pay a $20,000 fine and restitution of $675 (01-R. 359, 397).

based on the fact that [petitioner] would almost certainly receive a substantially enhanced sentence if he was to go back for resentencing" (06-R. 28 at 27).

On February 8, 2007, the magistrate filed a detailed 32-page report addressing each of petitioner's claims and recommending that petitioner's motion be denied without a hearing (06-R. 24). The magistrate rejected, *inter alia*, petitioner's allegation that his counsel during his first appeal was constitutionally ineffective and explained:

> [Petitioner] received vigorous and able representation on direct appeal which resulted in the vacatur of two of the four charges against him, and vacatur of his sentence[]. * * * If counsel had dismissed or not filed an appeal, it is arguable that [petitioner] would then be claiming that counsel was ineffective for failing to perfect an appeal. In this case, no showing has been made that appellate counsel was ineffective for failing to dismiss the * * * appeal.
>
> * * * [T]he claims raised are unsupported by the record or without merit. Consequently, no evidentiary hearing is required.

(06-R. 24 at 30-31).[7]

On March 7, 2007, the district court adopted the Magistrate's Report, denied petitioner's motion, and dismissed petitioner's case with prejudice (06-R. 30). On April 2, 2007, petitioner filed a motion for reconsideration and a motion

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[7] On February 26, 2007, petitioner filed objections to the Magistrate's Report (06-R. 25).

for a certificate of appealability and also filed a notice of appeal (06-R. 31, 32, 33). On April 9, 2007, the district court issued an order denying petitioner's motions and explained that contrary to petitioner's suggestion it

> []understood [petitioner's] claim that his counsel was ineffective for not "*advising* [*him*] *that he could or that he would likely receive an increased sentence*" if he persisted in appeal. * * * Considering the instant Motion, relevant portions of the record, and being fully advised in the premises, [it] continues to hold that [petitioner] has not made a showing that his counsel was ineffective.

(06-R. 35 at 1) (quoting Petitioner's Mot. at 3).

6. On January 31, 2008, this Court issued an order construing petitioner's notice of appeal as a motion for a certificate of appealability and granted petitioner permission to appeal the following issue only:

> Whether the district court erred in finding that counsel was not ineffective for pursuing appellant's first direct appeal after failing to recognize a calculation error in the original presentence investigation report that, when corrected at re-sentencing resulted in a higher sentence for [defendant].

(06-R. 44 at 2).[8]

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[8] Petitioner's brother Juan Ramos also filed a *pro se* motion pursuant to 28 U.S.C. 2255 in the district court. See *Juan Ramos* v. *United States*, No. 06-cv-14253-KMM (S.D. Fla.). Petitioner's brother claimed that his trial counsel Mr. Nelson Rodriguez-Varela and his appellate counsel Mr. Palomares denied him his Sixth Amendment right to counsel for many of the same reasons alleged by

(continued...)

SUMMARY OF ARGUMENT

This Court should affirm the judgment of the district court denying petitioner's *pro se* motion pursuant to 28 U.S.C. 2255 because petitioner has failed to demonstrate that his counsel's performance was constitutionally deficient or prejudicial, both of which are required by *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). First, the record demonstrates that counsel's pursuit of appeal without advising petitioner of the possibility of a harsher sentence upon remand due to errors in the original PSR was within the wide range of reasonable professional assistance. After all, neither the prosecutor nor the district court detected that the original PSR failed to calculate correctly petitioner's base offense level. In addition, this Court has repeatedly held that defense counsel is not ineffective for failing to advise a defendant about matters that are uncertain, and in the instant case, it was not clear that petitioner would in fact receive a longer

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[8](...continued)
petitioner, including that appellate counsel was constitutionally ineffective for proceeding with his appeal without advising him that if his case were remanded for resentencing he could receive a higher sentence than his originally imposed erroneous sentence. Following a hearing before a magistrate, the district court denied petitioner's brother's motion. Petitioner's brother filed a notice of appeal and a motion for a certificate of appealability, which the district court denied. This Court construed his notice of appeal as a motion for a certificate of appealability, which is currently pending before this Court. See *Juan Ramos* v. *United States*, No. 07-15075-J (11th Cir.).

sentence upon remand until he was actually resentenced. Further, since it is well settled that erroneous advice about the length of a sentence is not constitutionally deficient performance rising to the level of ineffective assistance of counsel and petitioner's second sentence was less than three years longer than his original sentence, petitioner has failed to meet his burden under the first prong of the *Strickland* test.

Petitioner is also not entitled to relief because he has failed to establish prejudice as required by *Strickland*. It is undisputed that the district court committed error in calculating petitioner's initial sentence. Because precedent establishes that a counsel's deficient performance that deprives a defendant of something to which he is not entitled does not establish prejudice within the meaning of *Strickland*, counsel's pursuit of appeal without advising petitioner that he could receive a longer sentence than the erroneous sentence originally imposed does not amount to prejudice that entitles him to relief.

ARGUMENT

THE DISTRICT COURT CORRECTLY RULED THAT PETITIONER WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL DURING HIS INITIAL APPEAL

Petitioner, proceeding *pro se,* contends (Br. 22) that he was "denied his Sixth Amendment constitutional right to effective assistance of counsel during the

direct appeal process, when counsel pursued [his] first direct appeal after failing to recognize a calculation error in the original presentence investigation report that, when corrected at resentencing, resulted in a higher sentence." Because petitioner has failed to meet his burden of proof, this Court should affirm the judgment of the district court.

"In a Section 2255 proceeding, [this Court] review[s] legal issues *de novo* and factual findings under a clear error standard," and the denial of relief without a hearing is reviewed for abuse of discretion. *Otero* v. *United States*, 499 F.3d 1267, 1269 (11th Cir. 2007) (quoting *United States* v. *Walker*, 198 F.3d 811, 813 (11th Cir. 1999)). See *Aron* v. *United States*, 291 F.3d 708, 714 n.5 (11th Cir. 2002). Whether counsel is ineffective is a mixed question of law and fact that this Court reviews *de novo*. *Gordon* v. *United States*, 518 F.3d 1291, 1296 (11th Cir. 2008).

In *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), the Supreme Court established the standard for proving a claim of ineffective assistance of counsel. "To prevail on [such] a claim,* * * a defendant must establish * * * [that]: (1) 'counsel's performance was deficient,' meaning it 'fell below an objective standard of reasonableness'; and (2) 'the deficient performance prejudiced the defendant.'" *Gordon*, 518 F.3d at 1297 (quoting *Strickland*, 466

U.S. at 687, 104 S. Ct. at 2064). Because "[j]udicial scrutiny of counsel's performance must be highly deferential," a defendant's burden of persuasion is "heavy." *Strickland*, 466 U.S. at 689, 691, 104 S. Ct. at 2065, 2066; *Chandler* v. *United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc), cert. denied, 531 U.S. 1204, 121 S. Ct. 1217 (2001). To show that counsel's conduct was constitutionally unreasonable, a defendant must establish that "no competent counsel would have taken the action that * * * counsel did" without "the distorting effects of hindsight" and taking care to evaluate counsel's performance "from counsel's perspective at the time" of counsel's conduct. *Chandler*, 218 F.3d at 1315, 1316 (citations omitted). When "the record is incomplete or unclear about counsel's actions, [a court is to] presume that [counsel] did what * * * should have [been] done and * * * exercised reasonable professional judgment." *Id.* at 1315 n.15 (quoting *Williams* v. *Head*, 185 F.3d 1223, 1228 (11th Cir. 1999), cert. denied, 530 U.S. 1246, 120 S. Ct. 2696 (2000)).

In *Roe* v. *Flores-Ortega*, 528 U.S. 470, 473, 120 S. Ct. 1029, 1033 (2000), the Supreme Court applied *Strickland* to the failure of counsel to consult with a defendant and take an appeal. The Court set forth the proper framework for evaluating an ineffective assistance claim when counsel failed to file a notice of appeal and defendant did not explicitly request that a notice of appeal be filed.

The Court rejected a bright-line test that counsel is always constitutionally ineffective for failing to confer with defendant. *Id*. at 480, 1036. If counsel consults with the defendant, "advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes," the attorney's performance is not constitutionally ineffective unless he fails "to follow the defendant's express instructions with respect to appeal." *Id*. at 478, 1035. Of course, when a defendant specifically instructs counsel to appeal, counsel must do so. *Ibid.*

This is so even when the appeal lacks merit, is against counsel's better judgment, or "harmful" because "there is a real possibility" defendant may "face a higher sentence or [additional] charges * * * if he decides to appeal." *United States* v. *Poindexter,* 492 F.3d 263, 273 (4th Cir. 2007). See *Gomez-Diaz* v. *United States*, 433 F.3d 788, 791 (11th Cir. 2005) (appeal that counsel "did not feel * * * was the best course"); *United States* v. *Tapp*, 491 F.3d 263 (5th Cir. 2007) (meritless appeal); *United States* v. *Sandoval-Lopez*, 409 F.3d 1193, 1197 (9th Cir. 2005) (appeal that is "contrary to the plea agreement and harmful" to defendant). Consequently, counsel is not at liberty to disregard a defendant's explicit instructions to appeal.

In the instant case, immediately following their initial sentencings,

petitioner, his brother, and cousin retained new counsel to appeal their convictions and sentences. Moreover, there is nothing in the record to suggest that appellate counsel convinced petitioner to appeal. Petitioner has never claimed that pursuit of an appeal was anything other than his own decision or was contrary to his desire or instructions.

Petitioner nonetheless argues (Br. 25) that his attorney provided ineffective assistance for pursuing an appeal without advising him of a possible consequence. Petitioner contends that his attorney should have told him that if he prevailed on appeal and his case was remanded for resentencing, "he could potentially end up with an increased sentence" (Br. 26) due to "a calculation error in the original presentence investigation report." Br. 25. Petitioner is not entitled to relief because he has not demonstrated that his counsel's performance was constitutionally deficient or prejudicial, both of which are required by *Strickland*.

A. Appellate counsel's performance was not ineffective since the record demonstrates that counsel unquestionably performed within "the wide range of reasonable professional assistance." *Dingle* v. *Department of Corr.*, 480 F.3d 1092, 1099 (11th Cir.) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065), cert. denied, 128 S. Ct. 530 (2007). To prevail on an ineffectiveness claim, "the issue is not what is possible or what is prudent or appropriate," but rather

petitioner must demonstrate that "*no* reasonable lawyer * * * could have acted, in the circumstances, as [his] counsel acted." *Chandler*, 218 F.3d at 1313 (quoting *Burger* v. *Kemp*, 483 U.S. 776, 794, 107 S. Ct. 3114, 3126 (1987)); *Smith* v. *Singletary*, 170 F.3d 1051, 1055 (11th Cir. 1999) (quoting *White* v. *Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992) (explaining that the test is not "even what most good lawyers would have done"), cert. denied, 514 U.S. 1131, 115 S. Ct. 2008 (1995)). Given that neither the prosecutor nor the district court detected that the original PSR erroneously failed to rely on Count Four (harboring illegal aliens) to calculate petitioner's base offense level, see (01-R. 277), any failure by appellate counsel to discover and advise petitioner of the same does not "fall below 'an objective standard of reasonableness.'" *Chandler*, 218 F.3d at 1315 (quoting *Darden* v. *Wainwright*, 477 U.S. 168, 187, 106 S. Ct. 2464, 2474 (1986)). See, *e.g.*, *United States* v. *Cieslowski*, 410 F.3d 353, 359 (7th Cir. 2005) (Counsel's failure to take into account recent amendment to federal sentencing guidelines, also missed by prosecutor, did not amount to "constitutionally deficient performance."), cert. denied, 546 U.S. 1097, 126 S. Ct. 1021 (2006).

B. In addition, petitioner has not satisfied his burden under the first prong of the *Strickland* test because it was not clear that petitioner would receive a higher sentence upon remand. This Court has repeatedly held that defense counsel

is not ineffective for failing to advise a defendant regarding matters that are unsettled, uncertain, or inconclusive. See, *e.g.*, *Black* v. *United States*, 373 F.3d 1140, 1144 (11th Cir. 2004), cert. denied, 543 U.S. 1080, 125 S. Ct. 942 (2005); *Smith*, 170 F.3d at 1054 ("[T]he rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized.") (citation omitted).

For example, in *Black*, appellate counsel failed to point out two decisions, decided after defendant's appeal was filed but before it was decided, which would have limited petitioner's sentence on a drug conspiracy count to ten years, rather than the life sentence imposed. This Court ruled that counsel's performance was not ineffective. It explained that since counsel cannot render constitutionally unreasonable assistance when the matter "at issue is unsettled," appellate counsel "was not deficient for failing to predict what was not yet * * * certain," or failing to cite to dicta on the pertinent points. 373 F.3d at 1144, 1146. See, *e.g.*, *Smith*, 170 F.3d at 1054 (counsel not ineffective for erroneously assuring petitioner, who rejected plea offer that would have resulted in a sentence between nine and twelve years, that his prior conviction could not be used to enhance his sentence as a habitual violent felony offender since "lack of clarity" as to the law made it less than certain that petitioner, following a trial, would receive such an enhancement

leading to a sentence of 30 years' imprisonment with a mandatory minimum of ten years).

In the instant case, appellate counsel's pursuit of the appeal without advising petitioner of the possibility of a longer sentence on remand was not constitutionally defective because it was "not so unmistakably plain" that he would receive a harsher sentence until he was in fact resentenced. *Smith*, 170 F.3d at 1055. When appellate counsel filed petitioner's brief, there was no reason for him to know that petitioner's case would be remanded for resentencing in light of *Scheidler*. Nor could he have predicted that the Probation Department, the government, or the court would discover that petitioner's first sentence should have relied on Count Four (harboring illegal aliens) to compute petitioner's base offense level. See *Ramos II*, 130 F. App'x 415, 417-418 (11th Cir. 2005) (outlining the differences in the PSRs prepared for petitioner's first and second sentencings), cert. denied, 546 U.S. 876, 126 S. Ct. 388 (2006). After all, the government was clearly unaware of the miscalculation at petitioner's original sentencing since it did not object to the original presentence report on that basis (01-R. 277). In fact, had the district court not ordered a new presentence report for petitioner's resentencing, which would have been permissible, there is no reason to believe that the miscalculation would have been detected and corrected at

petitioner's resentencing. See *United States* v. *Conhaim*, 160 F.3d 893, 896 (2d Cir. 1998) (district court not required to order new presentence report when resentencing defendant); *United States* v. *Hardesty*, 958 F.2d 910, 915-916 (9th Cir. 1992) (same), cert. denied, 507 U.S. 978, 113 S. Ct. 1429 (1993); *United States* v. *Bleike*, 950 F.2d 214, 220 (5th Cir. 1991) (same); *United States* v. *Fernandez,* 916 F.2d 126, 129 (3d Cir. 1990) (same), abrogated on other grounds, cert. denied, 500 U.S. 948, 111 S. Ct. 2249 (1991). Accordingly, even if petitioner's counsel had recognized an error in petitioner's original sentence (which the government, Probation Department and district court all missed), he could not know whether the miscalculation would ultimately be detected and corrected.

Similarly, there was no way for appellate counsel to predict whether the district court would ultimately impose adjustments for obstruction of justice and for leadership role at a resentencing since it had not entertained the government's request for those adjustments at petitioner's original sentencing. It was "not so unmistakably plain" that the district court would correct the calculation of the base offense level or impose adjustments for obstruction of justice and petitioner's leadership role until petitioner was resentenced. Accordingly, appellate counsel could not have been constitutionally ineffective for pursuing petitioner's appeal

without advising him of these possibilities. *Smith*, 170 F.3d at 1055.

C. It has long been recognized that "[a] miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel." *United States* v. *Gordon*, 4 F.3d 1567, 1570 (10th Cir. 1993), cert. denied, 510 U.S. 1184, 114 S. Ct. 1236 (1994). See *United States* v. *Martinez*, 169 F.3d 1049, 1053 (7th Cir. 1999) ("[M]ere inaccurate prediction of a sentence does not demonstrate the deficiency component of an ineffective assistance of counsel claim.") (internal quotation marks and citation omitted); *Knight* v. *United States*, 37 F.3d 769, 775 (1st Cir. 1994) ("[A]n inaccurate prediction about sentencing will generally not alone be sufficient to sustain a claim of ineffective assistance of counsel."); *United States* v. *Turner*, 881 F.2d 684, 687 (9th Cir.) ("[M]ere inaccurate prediction, standing alone [does] not constitute ineffective assistance of counsel.") (internal quotation marks and citation omitted), cert. denied, 493 U.S. 871, 110 S. Ct. 199 (1989).

This Court addressed the issue in *United States* v. *Pease*, 240 F.3d 938, 941 (11th Cir.) (per curiam), cert. denied, 534 U.S. 967, 122 S. Ct. 381 (2001). In *Pease*, defendant pled guilty after counsel inaccurately informed him that he would not be sentenced as a career offender and would be sentenced "anywhere

from five to ten years." *Ibid*. This Court held that counsel did not provide constitutionally ineffective assistance even though defendant was sentenced as a career offender to a term of 30 years' imprisonment. *Id.* at 942 (citing *Thomas* v. *United States*, 27 F.3d 321, 325 (8th Cir. 1994) ("[C]ounsel's failure to inform client of possibility of sentence enhancement as career offender does not fall below objective standard of reasonableness.")).

This precedent leads to the conclusion that appellate counsel's pursuit of petitioner's appeal allegedly without discovering and advising petitioner that he could receive a longer sentence does not amount to an error that renders counsel's performance constitutionally deficent. See *Pease*, 240 F.3d at 941. See, *e.g.*, *Jones* v. *United States*, 178 F.3d 790, 793, 794 (6th Cir.), cert. denied, 528 U.S. 933, 120 S. Ct. 335 (1999); *United States* v. *Barnes*, 83 F.3d 934, 940 (7th Cir.), cert. denied, 519 U.S. 857, 117 S. Ct. 156 (1996). Even if erroneous advice about a sentence could amount to ineffective assistance of counsel, counsel's performance here was objectively reasonable since petitioner's second sentence was less than three years longer than his original sentence. Compare *Doganiere* v. *United States*, 914 F.2d 165, 168 (9th Cir. 1990) (counsel not ineffective when he advised defendant that maximum sentence he would receive was 12 years and defendant was sentenced to 15 years with a subsequent 20 year term of probation

because counsel's estimate was not a "gross mischaracterization" of the likely outcome), cert. denied, 499 U.S. 940, 111 S. Ct. 1398 (1991) with *United States* v. *Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) (Counsel's "gross[] underestimat[e]" that defendant faced a maximum exposure of 120 months when he could have been sentenced to consecutive ten year terms of imprisonment on each of 12 counts was substandard advice that "fell below * * * prevailing professional norms.") and *United States* v. *Day*, 969 F.2d 39 (3d Cir. 1992) (reversing dismissal of claim that counsel was ineffective for advising defendant to reject a plea offer and telling him the maximum sentence he could receive was eleven years when defendant went to trial and received twenty-two year sentence).

D. Petitioner is also not entitled to relief because he has not established prejudice as required by *Strickland*. Generally a defendant proves prejudice by showing that, but for counsel's actions, the outcome of the process would have been different. See *Hill* v. *Lockhart*, 474 U.S. 52, 56-59, 106 S. Ct. 366, 369-371 (1985). The Supreme Court, however, has identified "situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice.'" *Williams* v. *Taylor*, 529 U.S. 362, 391-392, 120 S. Ct. 1495, 1512 (2000) (referring to *Lockhart* v. *Fretwell*, 506 U.S. 364, 113 S. Ct. 838 (1993)).

In *Lockhart* v. *Fretwell*, during defendant's sentencing proceeding for

murder, counsel failed to object to consideration of pecuniary gain as an aggravating factor even though, at the time, caselaw would have prohibited such consideration. By the time the case reached the Supreme Court, however, the case law had been overruled. The Court held that counsel's failure to object did not amount to "prejudice" within the meaning of the *Strickland* test. The Court explained that "an analysis focusing solely on * * * outcome, * * * without attention to whether the result of the proceeding was fundamentally unfair or unreliable is defective," *Lockhart*, 506 U.S. at 369, 113 S. Ct. at 842, since "[a] defendant has no entitlement to the luck of a lawless decision[]." *Id.* at 374 (O'Connor, J., concurring) (quoting *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068). It emphasized that because "[u]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him," a defendant who merely alleges that "counsel's error * * * deprived [him] of the chance to have the * * * court make an error in his favor" is not entitled to prevail on a claim of ineffective assistance. *Id.* at 372, 371, 844, 843. According to the Court, "[t]o hold otherwise would grant criminal defendants a windfall to which they are not entitled." *Id.* at 366, 841. Thus, an ineffectiveness claim that contends that counsel's deficient performance deprived defendant of something to which he is

not entitled does not establish prejudice as required by *Strickland.*

Applying *Hill* v. *Lockhart*, the Ninth Circuit rejected a habeas petition that alleged counsel was ineffective for failing to advise a defendant to accept a plea bargain, which mistakenly offered a fourteen year sentence and avoided sentencing defendant to a mandatory life sentence. See *Perez* v. *Rosario*, 449 F.3d 954 (9th Cir. 2006). The court of appeals explained that because defendant "was not entitled to a plea bargain made on [a] mistaken * * * assumption[]" by the prosecutor that the three strikes law was inapplicable, "any attorney ineffectiveness that led [defendant] to reject the plea bargain" is not "legitimate prejudice" that satisfies the *Strickland* test. *Id.* at 959 (quoting *Williams* v. *Taylor*, 529 U.S. at 392, 120 S. Ct. at 1512).

Applying this precedent, petitioner cannot prevail because appellate counsel's alleged failure to advise him of the possibility of a longer sentence would not constitute "legitimate prejudice." After all, the district court committed error in calculating petitioner's initial sentence and thus petitioner had no legal right to it. See *United States* v. *Cochran*, 883 F.2d 1012, 1015 (11th Cir. 1989). See also *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) (defendant has no right to a shorter sentence when he is resentenced following dismissal of one or more counts on appeal), cert. denied, 519 U.S. 1137, 117 S. Ct. 1007

(1997). Accordingly, counsel's alleged failure to preserve petitioner's erroneous sentence is not prejudice that entitles petitioner to relief.

E. To grant petitioner relief in the context of this case would be particularly ill-advised. Petitioner has not cited and undersigned counsel has not found a single case that holds that appellate counsel is obligated to advise a defendant who seeks to appeal that he could receive a longer sentence than originally imposed should he prevail on appeal and be resentenced.[9] Consequently, should this Court

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[9] Neither *Lewandowski* v. *Makel*, 949 F.2d 884 (6th Cir. 1991) nor *Thompson* v. *United States*, 481 F.3d 1297 (11th Cir. 2007), amended and superceded by *Thompson* v. *United States*, 504 F.3d 1203 (11th Cir. 2007), cited by petitioner (Br. 5, 22, 24-26), dictate a contrary conclusion. In *Lewandowski*, the Sixth Circuit affirmed the judgment of the district court, following an evidentiary hearing, that counsel was ineffective for failing to consult with petitioner prior to appeal and failing to recognize that a change in law would allow petitioner to be charged with first-degree murder were he to prevail on his appeal to withdraw his guilty plea to second-degree murder. The court of appeals explained that while counsel was "not * * * obligated to inform [petitioner] of risks * * * which * * * could not have [been] known," counsel's performance was constitutionally defective because he was "on notice" of the change in the law. 949 F.2d at 888.

Lewandowski, which is not binding on this Court, is inapposite for several reasons. First, counsel here, unlike in *Lewandowski*, could not have been certain that the error in petitioner's original sentence would ultimately be detected and result in petitioner receiving a longer sentence upon resentencing. See Discussion, *supra*, pp. 4-7, 18-20. In addition, in *Lewandowski*, counsel's error, unlike the alleged error in the instant case, had dire consequences for Lewandowski since he ultimately received a first-degree murder conviction and life sentence without parole, rather than second-degree murder conviction with a 15- to 25-year

(continued...)

hold that petitioner's counsel was ineffective for failure to advise petitioner of the possibility of a longer sentence, its decision would be a dramatic departure from existing law with serious consequences for courts hearing 2255 motions. It would, for the first time, invite hundreds, if not thousands, of inmates to file 2255 petitions. After all, every defendant who appeals faces the possibility of resentencing; and for the most part, every district court that resentences a defendant can impose a sentence that is shorter than, the same as, or longer than originally ordered. Accordingly, should this Court conclude that the district court is required to hold a hearing to investigate petitioner's after-the-fact, uncorroborated claim, any convicted inmate who received a longer sentence upon

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[9](...continued)
sentence. Further, counsel in *Lewandowski* appealed without consulting defendant. Finally, in *Lewandowski*, unlike the instant case, the Sixth Circuit affirmed the judgment of the district court, which found that defendant would not have appealed if he had been advised of the risk associated with doing so. Accordingly, *Lewandowski* does not even suggest, much less dictate, that petitioner's appellate counsel was constitutionally ineffective.

Petitioner's reliance on *Thompson* is also misplaced. In *Thompson*, 481 F.3d at 1300, this Court held that counsel who failed to file a notice of appeal even though the defendant was "'unhappy' with his sentence" and inquired about appeal was constitutionally ineffective for failing to adequately consult with his client. That decision has no bearing on whether counsel's pursuit of an appeal in the circumstances of the instant case was constitutionally ineffective.

resentencing could argue that he is entitled to a hearing on his claim that appellate counsel failed to advise them as to the consequences of a second sentencing.

F. Finally, even if petitioner has "allege[d] facts that if true, would entitle him to relief," this Court should not, contrary to his request, vacate his sentence. *Aron*, 291 F.3d at 715. The district court denied petitioner's motion without holding an evidentiary hearing. Consequently, should this Court conclude that the district court wrongly rejected petitioner's claim, it should remand the case for an evidentiary hearing to determine what advice appellate counsel provided to petitioner and whether petitioner would have pursued an appeal, but for that advice. *Ibid.* See *e.g.*, *Gomez-Diaz*, 433 F.3d at 792-794 (remanding case for an evidentiary hearing where the record does not conclusively demonstrate that the facts alleged by petitioner, taken as true, present no ground for relief pursuant to 28 U.S.C. 2255).

CONCLUSION

WHEREFORE, the judgment of the district court denying petitioner relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief of the United States as Respondent-Appellee is proportionally spaced, has a typeface of 14 points, and contains 6,129 words.

_____

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April 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2008, two copies of the foregoing BRIEF OF THE UNITED STATES AS RESPONDENT-APPELLEE were sent by first class mail to the *pro se* counsel listed below.

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