No. 10-2277

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS A. BENIT,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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STATEMENT REGARDING ORAL ARGUMENT

Because appellant's Section 2255 motion was based entirely on erroneous assertions of fact that are refuted by the record, and because the uncontested facts demonstrate the correctness of the court's finding that appellant's illegal conduct caused a minimum loss to his victims of at least $1.5 million, oral argument is not necessary for resolution of this appeal.

STATEMENT OF JURISDICTION

The District Court's jurisdiction rested on 28 U.S.C. § 2255(a). This Court's jurisdiction rests on 28 U.S.C. §§ 1291, 2255(d).

STATEMENT OF THE ISSUES

1. Whether Fed. R. Crim. P. 32(f) and (i)(3)(A) foreclose Benit's belated assertions of factual errors in the Presentence Report ("PSR") because he failed to object to the PSR, and further failed to call to the court's attention during the sentencing hearing any factual issues that could affect his sentence.

2. Whether Benit received ineffective assistance of counsel when his counsel advised him that his unlawful conduct made him responsible for at least $1.34 million in losses and the uncontested facts show that Benit's conduct caused a minimum of $1.5 million of actual losses.

STATEMENT OF THE CASE

On May 23, 2006, a federal grand jury sitting in the Eastern District of Michigan returned a nine-count indictment charging appellant Douglas Benit ("Benit"), his wife Mary Ann Elam Benit, and his company Coral Technology, Inc. ("Coral"), with conspiring to commit federal program fraud, mail fraud and wire fraud (18 U.S.C. § 371), and conspiring to commit money laundering (18 U.S.C. § 1956(h)). Record Entry ("R.E.") 3, Indictment. The indictment further

charged Benit, either alone or with his wife and/or with Coral, with federal program fraud (18 U.S.C. § 666), mail fraud (18 U.S.C. §§ 1341, 1342), wire fraud (18 U.S.C. § 1343), and bank fraud (18 U.S.C. § 1344). On August 2, 2006, the grand jury returned a second indictment in a separate case (No. 06-20403, R.E. 1) that charged Benit with another count of mail fraud. The district court consolidated the two cases for trial. R.E. 100.

On November 24, 2008, Benit pled guilty, pursuant to a negotiated plea agreement, to one count each of mail fraud (Count 4) and bank fraud (Count 7). R.E. 145, Plea Agreement ("Plea Agmt."); 146, Plea Hearing Transcript ("Plea Tr."). On March 26, 2009, the court sentenced Benit to 46 months imprisonment on each count, to be served concurrently, followed by 3 years supervised release. R.E. 158, Judgment; 159, Sentencing Transcript ("Sent. Tr."), p. 14. While the court did not impose any fine, it did order Benit to pay $1,342,702 in restitution, an amount the parties had agreed on prior to sentencing. R.E. 158, Judgment, p. 5; 159, Sent. Tr., pp. 3-4. The government dismissed all remaining charges against Benit including the mail fraud count in No. 06-20403, and all charges against Coral. Appellant's Brief ("Br.") 15; R.E. 159, Sent. Tr., pp. 9-10, 17. Finally, while Benit waived his right to appeal his conviction, so long as the sentence imposed was less than the sentence allowed by the agreement, the plea agreement

did allow him to appeal the "Court's Order of Restitution," R.E. 145, Plea Agmt., p. 8. Benit did not appeal.

Subsequently, on November 20, 2009, after retaining new counsel, Benit filed a Section 2255 (28 U.S.C. § 2255) motion to set aside his guilty plea and sentence or, in the alternative, to correct his sentence and order of restitution claiming ineffective assistance of counsel. R.E. 164, Section 2255 Motion ("Motion"). The court denied the motion on July 27, 2010. R.E. 170, Order Denying Section 2255 Motion ("Order"). After receiving an extension of time within which to file a notice of appeal, R.E. 174, Benit filed his notice of appeal on September 29, 2010.[1] R.E. 175. The court issued an order granting a certificate of appealability on December 1, 2010. R.E. 177.

STATEMENT OF FACTS

A. The Fraud

From 1997 to 2003, Benit was the Director of Facilities Development for Ecorse Public Schools ("EPS") in Ecorse, Michigan. Part of his responsibilities

[1] Although the district court's order granting Benit's motion for an extension of time, R.E. 174, and Benit's docketed notice of appeal, R.E. 175, were both filed after the 30 days provided for in Fed. R. App. P. 4(b)(1)(A) had expired, Benit's motion for an extension of time, R.E. 170, was filed within that 30-day period and constitutes a timely notice of appeal for purposes of Fed. R. App. P. 3. *See United States v. Hoye*, 548 F.2d 1271, 1273 (6th Cir. 1977), *cited in United States v. Dotz*, 455 F.3d 644, 647 (6th Cir. 2006).

included overseeing a $45 million bond fund for the construction and renovation of schools. EPS also received federal funding through the E-Rate program.[2] Under E-Rate, only USAC-approved equipment is eligible for E-Rate funding, and service/equipment providers can not participate in the vendor selection process or complete forms necessary for E-Rate reimbursement. Br. 6; R.E. 3, Indictment ¶¶ 1, 4-6.[3]

At all relevant times, Benit also was the owner and CEO of Coral Technology, Inc. ("Coral"). R.E. 3, Indictment ¶¶ 6, 60-65; Presentence Report ("PSR") ¶ 8. Coral was a distributor of educational technology and received a commission on its sales. Nearly all of Coral's income came from EPS contracts. R.E. 3, Indictment ¶ 7; PSR ¶ 24. During his employment with EPS, Benit concealed his relationship with Coral from both EPS and USAC officials who approved contract awards to Coral, and he used his position with EPS to direct

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[2] Congress created the E-Rate program in the Telecommunications Act of 1996 to provide funding to connect schools to the internet. The Federal Communications Commission designated Universal Services Administrative Company ("USAC") to administer the E-Rate program. R.E. 3, Indictment ¶ 4. For additional information on the operation of the E-Rate program see *United States v. Green*, 592 F.3d 1057, 1060-61 (9th Cir. 2010).

[3] By pleading guilty to Counts 4 and 7 of the indictment, Benit admitted the discrete facts alleged in the indictment that constitute his crimes. *United States v. Broce*, 488 U.S. 563, 570 (1989); *United States v. Gibney*, 519 F.3d 301, 305 (6th Cir. 2008).

those contracts to Coral. R.E. 3, Indictment ¶¶ 15-20. And in his position at EPS, Benit prepared documents necessary for EPS and USAC to make payments to Coral. *Id.* ¶¶ 21-24.

In January 2000, Benit sought a large sum of E-Rate funding for EPS. Ultimately, General Electric Contracting ("GEC") received $1,835,920 in E-Rate funding for fiber optic cabling, and NEC Business Network Solutions ("NEC") received over $4 million from E-Rate for networking equipment. PSR ¶ 17. GEC, however, did not do fiber optic cable work. Instead, Benit told GEC to give Coral a multi-million dollar, multi-year subcontract for the fiber optic work, and to increase GEC's contract price with EPS from $1.99 million to $4.48 million to cover the subcontract.[4] GEC complied. *Id*. ¶ 19.

Ultimately, GEC paid $1,054,528 of its fiber optic E-Rate funding to Coral. However, GEC did not know whether Coral actually performed any fiber optic cable work for EPS. PSR ¶ 20. In fact, EPS had contracts with two other companies, Clover Technology ("Clover") and Advanced Integration Group ("AIG"), to perform the fiber optic work. *Id.* ¶¶ 21-22.

The project manager for Clover, which installed the internal fiber optic

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[4] Coral proposed a 5-year, $3 million subcontract with GEC under which Coral would receive $1.5 million the first year, and $384,895 a year for four additional years. PSR ¶ 19.

cabling at EPS schools, never heard of Coral and never saw another company's workers installing fiber optic cable. PSR ¶ 21. Similarly, AIG had a contract to install the fiber optic cabling between schools, and only its subcontractor, AmComm Telecommunications, performed this work. *Id*. ¶ 22. However, when Clover submitted a $45,440 payment request to EPS for some of its fiber optic work, Coral paid the bill. *Id*. ¶ 23. Likewise, Coral paid a $155,651 bill submitted by AIG to EPS for some of its fiber optic work. *Id*. Although the PSR concluded that all of the $1.8 million that E-Rate gave to GEC for fiber optic work constituted a loss because neither GEC nor Coral did any fiber optic work, PSR ¶ 28, it concluded that the "minimum" loss caused by Benit's fraud was the $1,054,528 GEC paid Coral less the payments Coral made to Clover and AIG; *i.e*., $853,436 of E-Rate funding for Coral doing nothing.[5] *Id*. ¶¶ 25, 29.

Additionally, the E-Rate program requires participating schools to provide "matching" funds based on the local level of poverty. R.E. 3, Indictment ¶ 5; PSR ¶ 10. EPS paid Coral $164,600 in matching funds required by the E-Rate program for the fiber optic contract under which Coral did no work. PSR ¶ 15. The PSR treated this payment as a complete loss. *Id.*

After NEC received its E-Rate funding, Benit required NEC to purchase a

[5] The PSR incorrectly computed this figure as $853,145. PSR ¶ 25.

"Multicenter"— a computer-based learning laboratory for children—with $700,000 of that funding. However, Multicenters are ineligible for E-Rate funding, and had USAC known that $700,000 of its funds would be used to purchase a Multicenter, it would have denied the funding. R.E. 3, Indictment ¶¶ 50-53; PSR ¶ 27. The PSR therefore concluded that the entire $700,000 constituted a loss to E-Rate. PSR ¶ 28. Moreover, the $700,000 of E-Rate funding that NEC paid for the Multicenter actually purchased two Multicenters: Coral secretly kept the second at its Middletown, Ohio office to use as a sales tool. PSR ¶ 27. The PSR concluded that the "minimum" loss caused by Benit forcing NEC to pay 700,000 E-Rate dollars for a Multicenter was $540,000: $350,000 for the Multicenter Coral kept for itself plus a $190,000 sales commission Coral collected on the sale of the one ineligible Multicenter that EPS received. *Id*. ¶¶ 26, 29.

EPS also paid Coral under non-E-Rate contracts. Had EPS known that Benit was awarding these contracts to his own company, EPS would not have approved the funding. R.E. 3, Indictment ¶¶ 20-23; PSR ¶¶ 9, 13. Under these contracts Coral received at least $671,720. Because Coral typically made a 40 percent profit on its sales, the PSR concluded that the best estimate of loss to EPS under these contracts was the 40 percent Coral retained as profit, or $268,688.

PSR ¶¶ 11-12. Coral also received $177,391 from EPS as profit on sales of education laboratories to EPS. The PSR treated this amount as a loss. *Id*. ¶¶ 13-14. Finally, when Benit applied to a bank for a $200,000 line-of-credit, Benit misrepresented both his income and his assets. However, because Benit eventually paid off the loan, the PSR concluded that the bank incurred no loss despite Benit's fraud. PSR ¶¶ 30-32.

B. The Plea Bargain Agreement

In the plea agreement, Benit stipulated that his base offense level was 7 and that the loss caused by his crimes was greater than $1 million, which resulted in a 16-level increase under the sentencing guidelines. R.E. 145, Plea Agmt., pp. 4-5 and Worksheet A; *see* U.S.S.G. § 2B1.1(b)(1)(F). The plea agreement further provided that Benit and Coral benefitted from his crimes "by at least $2.276 million," and that "the Court may order restitution to every identifiable victim of Defendant's offense. There is no agreement on restitution." R.E. 145, Plea Agmt., pp. 3, 6. At his plea hearing, Benit acknowledged his satisfaction with counsel's representation, R.E. 146, Plea Tr., p. 4, admitted that he defrauded both the E-Rate program and the bank, *id.* at 11-12, 14, and agreed that his total offense level was 24, which resulted in a guidelines range of 51 to 63 months. *Id*. at 7. With respect to restitution defense counsel opined: "I believe that after Probation does their

investigation and submits a report, be it the preliminary report, the government and I can agree on restitution amounts, if applicable. . . . I believe that's an area that we can work out prior to sentencing." *Id*. at 14.

The PSR originally recommended restitution in the amount of $2,039,800, with $1,393,145 going to the E-Rate program (USAC) and $646,655 going to EPS. March 16, 2009 PSR ¶ 97;[6] R.E. 170, Order, p. 11. Benit, who filed a sentencing memorandum, R.E. 154, and personally read the PSR, made no objection to the PSR. R.E. 159, Sent. Tr., p. 4. Prior to sentencing, however, the parties agreed to restitution of $1,342,702, with $853,000 going to USAC and $489,702 going to EPS. *Id*. at 3-4; March 26, 2009 PSR ¶ 97.

At his sentencing hearing, Benit told the court that he believed the restitution amount was based on Coral's "gross profit" and that the "profit to

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[6] The PSR originally was prepared on February 18, 2009. Paragraph 83 of that PSR concurred with the stipulated Plea Agreement's assessment that the base offense level was 7 and the total offense level was 24, which resulted in a sentencing guidelines range of 51 to 63 months. Paragraph 83 was revised on March 16, 2009, to provide a base offense level of 6 and a total offense level of 23, which resulted in a guidelines range of 46 to 57 months. The government did not object to this change. R.E. 159, Sent. Tr., p. 5. This amended version of the PSR, which recommended Benit pay $2,039,8000 in restitution, was the one originally filed with the court. *See* R.E. 170, Order, p. 11. As explained *infra*, after the parties agreed to $1,342,702 in restitution, paragraphs 35 and 97 of the PSR were modified on March 26, 2009, to reflect the parties' stipulated agreement on the amount of restitution. Except for the modifications to paragraphs 35, 83 and 97 noted here, all three versions of the PSR are identical.

[him] personally is probably less than 15 percent of the restitution amount." R.E. 159, Sent. Tr., pp. 8-9. He also said that "[e]xcept for E-Rate," he believed Coral fulfilled all its contracts with EPS at a price "10 to 20 percent" less than other contractors would have charged. *Id*. at 9. The district court accepted the agreed-to amount of restitution, which was $697,098 less than the amount originally recommended in the PSR, R.E. 159, Sent. Tr., p. 14, and the PSR was amended later that day "to reflect the new figures." *Id.* at 4-5; March 26, 2009 PSR ¶¶ 35, 97.[7] The Judgment therefore provides: "Restitution amount ordered pursuant to plea agreement $1,342,702.00." R.E. 158, Judgment, p. 5. In agreement with the PSR the court found Benit's total offense level as 23 and sentenced him to the minimum 46 months of confinement recommended in the guidelines. R.E. 159, Sent. Tr., p. 14.

C. The Section 2255 Motion

On November 20, 2009, nearly eight months after he was sentenced, Benit

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[7] Ignoring the fact that the March 16, 2009, PSR originally given to the court recommended over $2 million in restitution, *see* note 6, *supra*, Benit wrongly claims that the District Court "incorrectly opined" that its order of restitution "'was nearly $700,000 less than the amount recommended in the [PSR].'" Br. 34 n.5 (quoting R.E. 170, Order, p. 12). Benit also is wrong in claiming that "the $1,342,702 restitution amount is ***exactly*** what was recommended by the PSR," *id.*; *accord id.* at 4, 14 (same), since the original PSR contained a higher amount.

filed a Section 2255 motion to set aside his guilty plea or, alternatively, to correct his sentence. R.E. 164, Motion. Claiming ineffective assistance of counsel, Benit argued that "the 'amount of loss' caused by Dr. Benit's conduct is $0." *Id*. at 5. Benit therefore argued that he was improperly counseled to agree to a 16-level increase in his offense level, and to $1,342,792 in restitution. *Id*. Benit's $0 loss claim was based on unsubstantiated allegations that the majority of Coral's contracts were awarded through a low bid process, and that Coral performed all of its contracts fully "at a price which was significantly lower than competing contractors could have performed such work." *Id.* at 13. Benit argued that the court incorrectly used Coral's gross profits to determine the amount of loss instead of finding any actual loss. *Id*. at 21-22. And he claimed there was no dispute that Coral performed all of its obligations under all of its contracts. *Id*. at 22-23.

The district court denied Benit's motion on July 27, 2010. R.E. 170, Order. Turning first to counsel's advice concerning the amount of loss for sentencing guidelines purposes, the court concluded that Benit's "view that there was no loss is myopic." *Id.* at 6. It noted that Benit had failed to show that Coral "was the low bidder in a normal bidding process or that it was positioned to or did perform any or all of its work." *Id.* The court concluded that Benit was responsible for GEC giving Coral an E-Rate funded subcontract for fiber optic cabling and that "it is

doubtful that Coral Technology did any fiber optic cabling at EPS." *Id*. at 8. It therefore reasoned that because Coral netted $853,145 in E-Rate funds paid to Coral by GEC, and additionally was paid $164,600 in matching funds from EPS, all "*for work that was never performed*," those payments, which totaled $1,017,745, amounted to a compete loss. *Id.* (emphasis added).

The court also found that by forcing NEC to pay $700,000 in E-Rate funds for an unauthorized Multicenter with a value to EPS of only $160,000, Benit caused a further loss to the E-Rate program of at least $540,000. *Id*. at 9. Because these undisputed losses total over $1.5 million, the court concluded that "the 16 point addition to Defendant's sentencing guideline level, which is merely advisory, was appropriate" and, consequently, that "Benit cannot establish that the advice he received was deficient." *Id*. In the alternative, the court noted that because E-Rate funding constitutes "a 'government benefit' under U.S.S.G. § 2[B]1.1, Application Note 3(F)(ii), . . . this Court would be permitted to find Benit responsible for the full amount of the E-Rate Grants [$1.8 million to GEC and $700,000 to NEC] that were improperly obtained." *Id.* at 10-11.

The court then addressed Benit's claim that his counsel's advice concerning the $1.39 million in agreed-to restitution was deficient. The court concluded that Benit was wrong in claiming that his restitution was based on Coral's gross

profits. Rather, the court explained, "[t]he value of goods received by EPS were deducted from the contract totals in reaching a final loss calculation." R.E. 170, Order, p. 12. While Benit's counsel's had used the phrase "gross profits" during the sentencing hearing, the court believed that he did so only in explaining that Benit understood that as the owner of Coral, Benit was responsible for the funds it received as a result of Benit's fraud. As the court observed: "it is clear that the restitution figure of just over $1.3 million was not a reflection of Coral Technology's gross profits, which were in excess of $2 million." *Id*. at 13. The court therefore concluded that "restitution was reached based on proper consideration of the facts, that is the losses suffered by EPS and USAC." *Id*.

SUMMARY OF ARGUMENT

Benit received the benefits of the plea agreement he signed. Pursuant to that agreement, eight of ten charges against him were dismissed and he received a sentence within the Guidelines range specified in the agreement. Finally, the restitution he was ordered to pay was in the exact amount he agreed to pay. But Benit now claims that the attorney who negotiated this good deal on his behalf was ineffective. To prove his assertion he must establish that his "attorney's representation amounted to incompetence under 'prevailing professional norms'" that caused actual prejudice. *Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770,

778 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). This he cannot do.

Benit's ineffective assistance claim is bottomed on his statements during sentencing that (1) "[t]he restitution amount stated is a gross profit amount;" (2) he "personally" profited far less than the agreed-to amount of restitution; and (3) "[e]xcept for E-Rate" contracts, he believed Coral completed its contracts with EPS and at a fair price. R.E. 159, Sent. Tr., pp. 8-9, *cited in* Br. *passim*. The district court correctly found Benit's first statement was wrong and that restitution was based on actual losses caused, not profits earned. Benit's second statement is irrelevant because he is responsible for the losses he caused whether or not they profited him.

Finally, whether or not Coral fulfilled non-E-Rate contracts at a bargain price, Benit's third statement, is irrelevant because Benit expressly carved E-Rate contracts out of his unsupported allegation that Coral completed its contracts with EPS. And because the undisputed facts demonstrate Benit's unlawful conduct caused actual E-Rate losses to USAC and EPS in excess of $1.5 million, Benit's attorney's advice—that for sentencing guidelines purposes the loss he caused was over $1 million, and further that he was responsible for at least $1.34 million in restitution— was correct and was not ineffective assistance of counsel. Nor could

Benit's attorney's advice have prejudiced Benit, because the amount of actual loss caused by Benit's unlawful conduct is far greater than the amount of restitution Benit agreed to pay.

ARGUMENT

I. STANDARD OF REVIEW

Under § 2255, a district court may vacate, set aside or correct a prisoner's sentence if the prisoner establishes, *inter alia*, "'an error of constitutional magnitude.'" *Mallett v. United States*, 334 F.3d 491, 496 (6th Cir. 2003) (quoting *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001)). When the alleged constitutional error is ineffective assistance of counsel, as Benit claims here, "a defendant must show that: (1) his trial counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant." *Mallett*, 334 F.3d at 497 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)); *see Hill v. Lockhart*, 474 U.S. 52, 58 (1985) ("the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.").

The first prong of the *Strickland* test requires a showing "that counsel's representation 'fell below an objective standard of reasonableness.'" *Mallett*, 334 F.3d at 497 (quoting *Strickland*). This standard is "highly deferential" because

there is a strong presumption that counsel acted "'within the wide range of reasonable professional assistance.'" *Id.* Thus, more precisely, a defendant must show that his "attorney's representation amounted to incompetence under 'prevailing professional norms.'" *Richter*, 131 S. Ct. at 778 (quoting *Strickland*). The second *Strickland* prong requires a showing that but for counsel's incompetence, the results would have been different. *Mallett*, 334 F.3d at 497. "[S]trict adherence to the *Strickland* standard [is] all the more essential when reviewing the choices an attorney [makes] at the plea bargain stage." *Premo v. Moore*, 562 U.S.___, 131 S. Ct. 733, 741 (2011). This is true because "[p]lea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks." *Id.*

Courts are not required to analyze both *Strickland* prongs and may dispose of an ineffective assistance claim under either. *Mallett*, 334 F.3d at 497. Ineffective assistance of counsel claims present mixed questions of law and fact. Findings of fact are reviewed only for clear error while the court's legal conclusions are reviewed *de novo*. *Id.*; *accord Regalado v. United States*, 334 F.3d 520, 524 (6th Cir. 2003).

II. BENIT'S COUNSEL WAS NOT INCOMPETENT

"A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 689). Thus, "'[s]urmounting *Strickland's* high bar is never an easy task.'" *Richter*, 131 S. Ct. at 788 (quoting *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473, 1485 (2010)). In applying the *Strickland* test below, the court found that "the loss caused by [Benit's] actions is no less than $1,557,745.67." R.E. 170, Order, p. 9. Because that amount is greater than the $1 million necessary to support a 16-level increase in Benit's offense level, and because it also is greater than the amount of restitution Benit agreed to pay, the court concluded that "Benit cannot establish that the advice he received was deficient." *Id.* The court further concluded that Benit was wrong in claiming "that the restitution amount was a gross profit amount" and it found, instead, that restitution was properly based on "the losses suffered by EPS and USAC." *Id*. at 13. The court's findings and conclusions are unassailable.

A. Benit Caused Actual Losses of More Than $1.5 Million

As the district court correctly explained in denying Benit's Section 2255 motion, his claim of ineffective assistance is grounded on an unsupported

assertion (*e.g.*, Br. 27) that Coral actually performed the E-Rate contracts and, therefore, that the losses caused by Benit are zero. R.E. 170, Order, pp. 6, 8-9. Benit's zero-loss claim is refuted by the record. Indeed, Benit never disputed at the sentencing hearing the factual findings in the PSR that directly contradict his current assertions.

In repeatedly claiming that the PSR incorrectly computed loss as equal to Coral's "gross profits" (*e.g.*, Br. 11-12, 24, 34, 43), Benit misperceives the PSR which expressly found that the vast majority of the losses Benit caused were payments for work that was never performed or for merchandise that was never received. For the fiber optic cabling funded by E-Rate, the PSR found that: (1) GEC did not do fiber optic work and had no knowledge whether Coral did any such work under its subcontract with GEC (PSR ¶¶ 18, 20); (2) EPS granted a bond-funded contract to Clover to install the internal fiber optic cable at EPS schools and Clover's project manager never saw any Coral workers installing fiber optic cable (*id*. ¶ 21); (3) AIG did all the fiber optic cabling between school buildings under a bond-funded contract with EPS (*id*. ¶ 22); and (4) GEC paid Coral $1,054,528 of its fiber optic E-Rate funding, and Coral in turn paid Clover and AIG a total of $201,092 for some of their fiber optic work. *Id*. ¶¶ 23, 25. The PSR therefore found that the amount GEC paid Coral for doing nothing, less the

amount Coral paid Clover and AIG for some of their fiber optic work, *i.e.*, $853,436,[8] was the *minimum* loss to E-Rate under its fiber optic funding with GEC.[9] *Id.* ¶ 29. And because EPS paid Coral $164,600 in matching E-Rate funds for fiber optic work that Coral never performed, the PSR found EPS suffered a loss in that amount. *Id.* ¶ 15.

Thus, as the district court correctly found, nearly all of the money that Coral received to perform fiber optic cabling was "paid for work that never was performed." R. 170, Order, p. 8; *accord id.* at 9 ("the Court is convinced that Coral Technology did not perform the work"). Because being defrauded into paying for something but receiving nothing in return—the equivalent of theft—constitutes a loss,[10] the district court rightly reasoned that the losses caused by Benit's E-Rate fiber optic fraud amounted to a minimum of $1,017,745. *Id.* at

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[8] *See* note 5, *supra.*

[9] The PSR also correctly found that the entire $1,835,920 of E-Rate funding paid to GEC could be treated as a loss caused by Benit because Benit sought the funding knowing Coral would receive a subcontract for the work that Coral never intended to undertake. PSR ¶ 28. Additionally, GEC did no fiber optic work itself. *Id.* ¶ 18. Even if the $201,092 Coral paid to Clover and AIG is deducted from the amount E-Rate paid to GEC, which is unnecessary because Clover's and AIG's contracts were funded with bond money not E-Rate money, PSR ¶¶ 21-22, E-Rate suffered a loss of at least $1,634,828 from Benit's fraud.

[10] *See, e.g.*, *United States v. Hunt*, 521 F.3d 636, 645-46, 648 (6th Cir. 2008).

8. That amount alone justifies Benit's 16-level sentencing guidelines increase for causing a loss in excess of $1 million. *See* U.S.S.G. § 2B1.1(b)(1)(I).

Similarly, for the ineligible Multicenter that Benit forced NEC to purchase with E-Rate funds, the PSR concluded that because that $700,000 paid for two Multicenters (including the one Coral secretly kept), and because Coral received a $190,000 sales commission for the one Multicenter EPS did receive, Benit's fraud caused a *minimum* loss of $540,000. PSR ¶¶ 26-27, 29. The district court agreed. R.E. 170, Order, p. 9. This finding is not clearly erroneous because E-Rate certainly was deprived of at least that much money that it otherwise could have used to fund eligible E-Rate projects.[11] When this loss is added to the fiber optic cabling losses, the district court correctly concluded, "the loss caused by [Benit's] actions is no less than $1,557,745.67."[12] R.E. 170, Order, p. 9. Thus, Benit is simply wrong that "the record of the District Court in the instant case, including

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[11] The PSR also concluded that the entire $700,000 NEC paid for the ineligible Multicenter could be treated as a loss to E-Rate. PSR ¶ 28. That conclusion is reasonable because E-Rate was deprived of $700,000 that it otherwise could have used to fund eligible projects. In other words, unlike fiber optic cabling done by Clover and AIG that Coral reimbursed, an E-Rate-eligible—albeit here not funded—project, Multicenters were not E-Rate eligible and any money paid for them represented a loss to E-Rate, the victim of the fraud.

[12] Because the PSR incorrectly calculated the minimum loss under fiber optic cabling as $853,145 instead of $853,436, *see* note 5, *supra*, the actual minimum loss caused by Benit is $1,558,036.

the PSR, contains no evidence whatsoever as to any actual losses sustained by the victims." Br. 26.

There is nothing in the record to refute the district court's finding that Benit caused over $1.5 million in actual losses. Benit's comments at sentencing, repeatedly relied on in his Brief (*see* Br. *passim* citing R.E. 159, Sent. Tr., pp. 8-9), are not to the contrary. As noted above, Benit's statement that "[t]he restitution amount stated is a gross profit amount," R.E. 159, Sent. Tr., p. 8, is simply wrong. Rather, the restitution amount is less than the amount of actual E-Rate losses Benit caused. Admittedly, those losses to USAC and EPS for the most part were pure "profit" to Coral because Coral was receiving money and doing nothing in return. But that does not change the fact that those monies were actual losses for USAC and EPS, who Benit duped into paying for nothing. *See, e.g., United States v. Hunt*, 521 F.3d 636, 645-46, 648 (6th Cir. 2008) (concluding that when Medicare and Blue Cross are defrauded into paying for medical services that "had not actually [been] performed," those payments constitute a loss); *United States v. Martinez*, 588 F.3d 301, 326-27 (6th Cir. 2009) (same).

For largely the same reasons, Benit's statement that "the profit to [him] personally is probably less than 15 percent of the restitution amount," R.E. 159, Sent. Tr., pp. 8-9, is completely irrelevant. Benit is responsible for the actual

losses he caused whether or not he profited from his actions. *E.g.*, *Hunt*, 521 F.3d at 648 (when defendant defrauded Medicare and Blue Cross in to making undeserved payments, defendant was responsible "for all of the losses that he caused, not simply the losses that wound up in [his] own pocket."); *United States v. Moten*, 551 F.3d 763, 768 (8th Cir. 2008) (citing *Hunt* and holding defendant who received no benefit from theft of public funds responsible for full amount of losses caused).

And this is exactly how the court understood Benit's counsel's statement to the court that counsel had "explained to [Benit] under the law he's still responsible for the gross profit that went to his business, Coral Technology, as opposed to net profits that were in pocket to him."[13] R.E. 159, Sent. Tr., p. 9. The court explained that it had understood Benit's counsel as "advis[ing] the Court that Benit was informed that accountability for Coral Technology fell on Benit." R.E. 170, Order, p. 13. And it correctly found that counsel could not be understood as stating that the $1,342,702 in agreed-to restitution was based on Coral's gross profits, as Benit repeatedly claims (Br. *passim*), because Coral's gross profits

[13] Benit quotes only part of this statement in asserting that "counsel incorrectly advised him that the 'amount of loss' for purposes of the Sentencing Guidelines and the restitution amount were to be calculated based upon 'gross profit that went to his business, Coral Technology.'" Br. 17-18 (quoting R.E. 159, Sent. Tr., p. 9).

"were in excess of $2 million."[14] R.E. 170, Order, p. 13.

Similarly unavailing is Benit's statement that he believed Coral completed its contracts with EPS.[15] The problem for Benit is that because he expressly carved E-Rate contracts out of his claim that Coral performed its EPS contracts and at a bargain price, his statement about other contracts Coral had with EPS does not contradict the court's finding that Coral did not perform its E-Rate contracts.[16]

Thus, because (1) the PSR expressly found that Coral performed no fiber optic work and further duped E-Rate into buying Coral a Multicenter for its own use, (2) Benit did not object to these or any other findings in the PSR, and (3) Benit himself carved E-Rate contracts out of his assertion that Coral completed its contracts with EPS, the court's finding that it "is convinced that Coral Technology

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[14] The court was correct that Coral's gross profits exceeded $2 million. *See* PSR ¶¶ 12-19, 29 (explaining that Coral grossed at least $2,039,800 from Benit's unlawful conduct).

[15] Benit told the court: "*Except for E-Rate* had other contractors done such similar work, it would have cost the District between 10 to 20 percent more depending on what type of work it was. The District did receive everything, uhh, my understanding it works and is being used for educational purposes." R.E. 159, Sent. Tr., p. 9 (emphasis added).

[16] *See* pp. 7-8, *supra*, explaining that in addition to E-Rate funded projects, Coral received bond-funded contracts from EPS.

did not perform the work" under its E-Rate contracts, R.E. 170, Order, p. 9, cannot be clearly erroneous.

In sum, the court correctly found that Benit caused actual losses of more than $1.5 million. And because that amount of loss was both sufficient to support a 16-level increase in Benit's offense level and also substantially more than the $1.34 million of restitution Benit agreed to pay, the court correctly concluded that "Benit cannot establish that the advice he received was deficient." R.E. 170, Order, p. 9. And while the district court did not expressly address *Strickland's* second prong, prejudice, the court's finding of more than $1.5 million in actual losses precludes any finding that Benit was prejudiced, even if counsel otherwise was ineffective.[17]

Prudential considerations also strongly advise against a finding that Benit's

[17] Indeed, Benit could have agreed to pay a restitution amount that exceeded EPS's actual losses. Under 18 U.S.C. § 3663A(a)(3), which applies to cases of fraud such as this, a court may order "restitution to persons other than the victim of the offense" "if agreed to by the parties in a plea agreement." *See United States v. Elson*, 577 F.3d 713, 724-25 (6th Cir. 2009) (finding that under 18 U.S.C. § 3663A(a)(3) defendant can agree to restitution to "an offense different from his offense of conviction"); *United States v. Sloan*, 505 F.3d 685, 695 (7th Cir. 2007) (finding that 18 U.S.C. 3663A(a)(3) "permits the defendant to undertake additional restitution obligations via a plea agreement"). Moreover, in agreeing to EPS's restitution amount, the government agreed to restitution for E-Rate in an amount far less than the PSR recommended and what E-Rate's actual losses otherwise could justify.

counsel was ineffective in this case. Benit's sentence was the result of protracted plea bargaining during which both sides made concessions to arrive at an agreement. Deference to judgments made by defense counsel is particularly appropriate in that setting. *Moore*, 131 S. Ct. at 742; *accord United States v. Bradley*, 400 F.3d 459, 464 (6th Cir. 2005) ("The salient point is that a plea agreement allocates risk between the two parties as they see fit."). Indeed, "strict adherence to the *Strickland* standard [is] all the more essential when reviewing the choices an attorney made at the plea bargain stage," because "a hindsight perspective" will often lack the "nuance[s]" of the negotiation, including whatever special "insights" the particular attorney might possess. *Moore*, 131 S. Ct. at 742. Additionally, because "*Strickland* allows a defendant 'to escape rules of waiver and forfeiture,'" the prospect that a plea can be undone by a court second-guessing counsel's decisions could reduce the likelihood that prosecutors will be willing to bargain away counts or stiffer penalties, as the government did here.[18] *Id.* at 741-42 (quoting *Richter*, 131 S. Ct. at 770); *accord Bradley*, 400 F.3d at 464 (same).

[18] Here, for example, in addition to agreeing to $700,000 less restitution than what the PSR recommended, the government dismissed 8 of Benit's 10 counts, and all counts against Coral. Nor did the government object to the court's decision not to impose a fine given the amount of restitution ordered. R.E. 159, Sent. Tr., pp. 14, 17.

Here, Benit's counsel was fully aware of all of the government's evidence[19] and could determine the likelihood that either going to trial or refusing to accept the agreed-to sentence and/or restitution could put Benit in a worse position. For example, the court made an alternative holding that it could "assess the value of the entire [E-Rate] contract as a loss" under U.S.S.G. § 2B1.1, Application Note 3(F)(ii) because E-Rate is a government benefits program. R.E. 170, Order, p. 10. Under this approach, Benit stood to be responsible for $2,535,920 in losses. *See* nn.9, 11, *supra*. That amount of loss would produce an 18-level increase in Benit's offense level, *see* U.S.S.G. § 2B1.1(b)(1)(J), and subject him to nearly twice the amount of restitution he bargained to pay.[20] And even if Coral's payments to Clover and AIG are subtracted from that amount, E-Rate losses still would equal $2,334,828. When the $164,600 E-Rate matching funds payment is added to that figure, it results in losses of $2,499,428 even before EPS's bond-funded contracts are taken into consideration,[21] which is perilously close to the $2,500,000 that triggers an 18-level increase.

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[19] *See* note 25, *infra*.

[20] Even Benit acknowledges that if the court found that the $700,000 paid for Multicenters went to "unintended uses" under § 2B.1.1(b)(1)(J), he would face a 14-level increase in his offense level. Br. 29.

[21] *See* pp. 7-8, *supra*.

Under these circumstances, the advice provided by Benit's counsel was reasonable, and certainly not incompetent. "The plea process . . . must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases were witnesses and evidence were not presented in the first place." *Moore*, 131 S. Ct. at 745-46. Here as in *Moore*, "[t]he substantial burden to show ineffective assistance of counsel . . . has not been met." *Id*. at 746.

B. Benit Waived His Ability To Attack The Factual Accuracy Of The PSR

Benit claims "it is the Government's burden to prove the amount of loss" and that "the Government never submitted any evidence of the victims [sic] actual losses to the District Court." Br. 27. He then chides the court for "merely summarily adopting the findings submitted by the Government in the PSR" without first holding a hearing. *Id.* at 38. But Benit failed to object to any factual assertions in the PSR, and further failed to call to the court's attention during the sentencing hearing any factual issues that could affect his sentence. Since the facts were undisputed, and the amount of restitution stipulated, the district court did not err in proceeding to impose sentence without hearing any additional evidence.

Benit is correct that Fed. R. Crim. P. 32(i)(3)(B) requires a district court to rule on disputed portions of a PSR. Br. 35. However, Rules 32(f)(1) and (2) require a defendant to file "objections to material information" in a PSR, and Rule 32(i)(3)(A) permits the district court to "accept any undisputed portion of the presentence report as a finding of fact." Here Benit, who acknowledged reading the PSR, never objected to any portion of it. R.E. 159, Sent. Tr., p. 4.

Nor did Benit's sentencing colloquy call to the court's attention any factual issue that could affect his sentence. Thus, while he stated his belief that restitution was based on gross profits—a point on which he was mistaken—he nonetheless told the court he was "accepting responsibility for it all."[22] R.E. 159, Sent. Tr., p. 9. Under these circumstances, the court cannot be faulted for accepting the findings of fact in the PSR. *See United States v. Duckro*, 466 F.3d 438, 449 (6th Cir. 2006) ("Given [the defendant's] approach at sentencing, the district court's acceptance of the uncontested facts from the pre-sentence report was appropriate.").

Benit's belated attack on the findings in the PSR with his Section 2255 motion is both too little and too late. Benit did not provide an affidavit or any

[22] As explained on pp. 21-23, *supra*, Benit's further sentencing hearing statements that he profited less than Coral and believed Coral completed its non-E-Rate funded contracts with EPS are irrelevant.

evidence contradicting the findings in the PSR in his Section 2255 motion. Moreover, Benit's claim of ineffective assistance has always been based on counsel's alleged use of the wrong legal standard to determine loss (*e.g.*, Br. 6-7, 17, 42-43, 47), not that counsel failed to object to erroneous factual assertions in the PSR. Nevertheless, in both his Section 2255 motion and here in his brief Benit claims that if "provided an opportunity" he would show that Coral "performed all of the work" and "at a discount."[23] Br. 27. On brief, Benit further alleges that he can demonstrate that "the Multicenters were a permissible use of E-Rate funds" and that EPS received $700,000 in benefits from the one Multicenter it did receive.[24] *Id*. at 29 n.3. But as noted above, Benit had the opportunity to dispute the factual underpinnings of the PSR and failed to do so.[25]

"To obtain collateral relief based upon errors to which no contemporaneous

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[23] As explained on p. 23, *supra*, to the extent Benit supports this claim by reference to his sentencing colloquy (*e.g.*, Br. 27, 49-50), Benit's reliance is misplaced because he carved E-Rate contracts out his in-court "performed all of the work" assertion.

[24] Benit never made this claim below.

[25] Significantly, as the government explained below, when it sent anticipated exhibits and testimony to the probation office to support the PSR, Benit's counsel "received copies of those documents, as well as having received full discovery." R.E. 167, Government's Response To Section 2255 Motion, p. 7 (citing to letter of transmittal to Benit's counsel). Thus, Benit was in possession of all the information underlying the factual assertions in the PSR.

objection was made, [Benit] must show: 1) 'cause' excusing his procedural default, and 2) 'actual prejudice' resulting from the errors of which he complains. *United States v. Frady*, 456 U.S. 152, 167-68 (1982)." *Nagi v. United States*, 90 F.3d 130, 134 (6th Cir. 1996) (footnote omitted); *accord Barash v. United States*, No. 98-1985, 2000 WL 1257041, at *2 (6th Cir. July 11, 2000). And because Benit's alleged "cause" is ineffective assistance, he must meet the *Strickland* test to establish cause. *Nagi*, 90 F.3d at 134-35. Since Benit has never claimed his counsel was ineffective for failing to object to the PSR, Benit has failed to establish the requisite "cause" excusing his procedural failure of not challenging the PSR earlier. *Id*. at 135.

Finally, the district court did not abuse its discretion in denying Benit's motion without first holding a hearing that Benit never requested. *See, e.g., Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006) (decision whether to hold hearing on Section 2255 motion reviewed for abuse of discretion). As this Court explained in *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999), a § 2255 petitioner is not entitled to a hearing when petitioner's assertions "are contradicted by the record . . . or [are merely] conclusions rather than statements of fact" (citation omitted). *Accord Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007). And "it would be nonsensical to conclude that the petitioner

could [require a hearing] simply by proclaiming his innocence." *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999); *accord Williams v. Bagley*, 380 F.3d 932, 977 (6th Cir. 2004) ("even in a death penalty case, bald assertions and conclusory allegations" are insufficient to require a hearing.).[26]

Here, Benit did not, for example, provide an affidavit or other evidence contradicting the PSR's findings that "[a]ccording to USAC, a Multicenter is ineligible for funding" (PSR ¶ 27), that Coral received E-Rate funding on its fiber optic contract "where Coral Technology, Inc. did little, if any, work" (*id.* ¶ 15), or that Benit sought the fiber optic E-Rate funding knowing that "Coral Technology, Inc., would receive a contract for fiber optic contracting that it never intended to undertake." *Id.* ¶ 28. Under these circumstances, the district court was not required to take additional evidence and could properly rely on the undisputed

[26] None of the cases Benit relies on in claiming the district court erred by not making independent findings (Br. 35-37) are § 2255 cases. Rather, they are all direct appeals and concern either appellants who were found to have waived their ability to challenge the PSR on appeal because they did not raise their objection before the sentencing court, such as *United States v. Solorio*, 337 F.3d 580, 598 n.16 (6th Cir. 2003), and *United States v. Hurst*, 228 F.3d 751, 760-61 (6th Cir. 2000) (Br. 35), or appellants whose timely objection to the PSR preserved their right to raise the issue on appeal, such as *United States v. Tarwater*, 308 F.3d 494, 518 (6th Cir. 2002), and *United States v. White*, 492 F.3d 380, 415 (6th Cir. 2007). Br. 36. *See, e.g., White*, 492 F.3d at 415 (under Fed. R. Crim. P. 32 "[a]s a threshold matter, the defendant must actively raise the dispute during the sentencing hearing before the district court's duty to find facts arises.").

facts found in the PSR. *See Turner*, 183 F.3d at 476-77 (no hearing required where § 2255 petitioner failed to submit "any statement raising a factual question regarding the effectiveness of his trial counsel"); *Valenzuela v. United States*, 217 F. App'x 486, 490-91 (6th Cir. 2007) (same, noting petitioner "did not submit an affidavit or any other evidence"); *Blanton v. United States*, 94 F.3d 227, 235 (6th Cir. 1996) (no abuse of discretion not to hold hearing because "record . . . conclusively show[ed] that [petitioner] was not entitled to relief").

CONCLUSION

The district court's order denying Benit's Section 2255 motion should be affirmed.

Respectfully submitted.

s/ John P. Fonte

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February 25, 2011

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 7,784 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4 with 14-point Times New Roman font.

February 25, 2011

s/ John P. Fonte
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CERTIFICATE OF SERVICE

I, John P. Fonte, hereby certify that on this 25th day of February, 2011, I electronically filed the foregoing Brief for Appellee the United States of America with the Clerk of the Court for the Sixth Circuit by using the appellate CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

February 25, 2011

s/ John P. Fonte
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ADDENDUM
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Appellee, the United States of America, designates the following as relevant district court documents:

Record Entry No.	Description of Document
1	Indictment
145	Plea Agreement
146	Plea Hearing Transcript
158	Judgment
159	Sentencing Transcript
164	Section 2255 Motion
167	Response To Section 2255 Motion
168	Reply To Response
170	Order Denying Section 2255 Motion
175	Notice of Appeal
177	Certificate of Appealability
N/A	Presentence Report