

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5707  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

J. MACK AUSBURN,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Western District of Texas  
(SA 91 CA 831 (SA 87 CR 242(7)))

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March 22, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

J. Mack Ausburn, an attorney, pleaded guilty to fourteen counts of mail fraud in violation of 18 U.S.C. §§ 2, 1341. Ausburn was among eight other co-defendants charged in a thirty-four count indictment for mail fraud.

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I

A

Ausburn was involved in a mail-fraud scheme in which he offered victims letters declaring them "recipients" of a free boat and motor so long as they called a certain telephone number within seventy-two hours. Once the eager recipients called the telephone number, a salesperson solicited the purchase of other items such as ball point pens, key chains, and calendars. The "free" boat actually received in the mail by many of the victims was a small inflatable raft and motor worth \$42.50. The victims, having been told that the size of the boat would require shipping charges of \$89.00 or \$99.00, paid that amount expecting the amount paid to cover pre-paid shipping charges only. Actually, those charges covered the price to the manufacturer of the little raft and motor together with the pre-paid shipping charges. Victims of the scheme included "literally thousands of individuals throughout the United States" with losses estimated by the U.S. Postal Inspector as "greatly exceed[ing] \$5,000,000.00."

B

The PSR calculated a base offense level of 6, which was increased by 11 for a "loss exceed[ing] \$5,000,000," 2 levels for "more than minimal planning," and 4 levels for Ausburn's leadership role in the offense. The PSR, recommending no adjustment for acceptance of responsibility, thus calculated a total offense level of 23. With a criminal history category of II--based on a previous

conviction for failure to file an income tax return--the PSR determined a guideline imprisonment range of 51 to 63 months.

Ausburn was sentenced to concurrent terms of 57 months imprisonment on thirteen of the counts. For one count, a pre-Guidelines offense, although Ausburn was sentenced to a consecutive term of five years, that sentence was suspended, and he was placed on supervised probation for five years. He did not appeal.

## II

### A

Ausburn has now filed a 28 U.S.C. § 2255 motion, alleging that the district judge (1) erred when he failed to give him a two-point reduction for acceptance of responsibility, (2) erred when he sentenced him based, in part, on pre-guidelines conduct in violation of double jeopardy, (3) erred when he failed to sentence him under the sentencing guidelines for all of his acts, and (4) erred when he sentenced him without departing downwardly. In a supplemental § 2255 motion, Ausburn argued, in part, that his failure to oppose his sentence at trial or directly appeal it thereafter resulted from his attorney's failure to "advise him that he had grounds to do so."

The government responded to Ausburn's motion, contending that, in part, he was procedurally barred from raising issues in a § 2255 motion that could have been raised on direct appeal. Ausburn responded, and countered, in part, that, although he failed to object to his sentence at trial, he was not procedurally barred

from raising his sentencing-guideline issues because "he and his counsel lacked sufficient familiarity with the sentencing guidelines to be aware that they had a right to do so." Ausburn also argued that, because he was sentenced under misleading commentary, he could not have raised the issue on direct appeal.

B

The magistrate judge recommended denial of Ausburn's § 2255 motion, concluding, in part, the following: (1) Ausburn was procedurally barred from attacking the district court's denial of a two-point adjustment for acceptance of responsibility because he failed to raise a constitutional issue; (2) although Ausburn was procedurally barred from raising the issue, the district court did not abuse its discretion to deny a downward adjustment; (3) although Ausburn was procedurally barred from raising the issue, the district court was not precluded from considering pre-guidelines conduct as relevant conduct for purposes of sentencing; (4) Ausburn could not be sentenced under the guidelines for the offense charged in count 16 because it was committed prior to November 1, 1987; (5) Ausburn's conduct, considered in separate counts against him, could be considered for purposes of sentencing on Count 16 without violating the Double Jeopardy Clause; and (6) Ausburn's "conclusory allegations" failed to show that counsel was constitutionally ineffective. Ausburn filed his "Objection to the Magistrate's Report."

The district court denied Ausburn's § 2255 motion, holding the following: (1) Ausburn's allegation that he was incorrectly denied a two-point reduction for acceptance of responsibility based on guideline commentary amended subsequent to sentencing failed to state a claim cognizable in a § 2255 proceeding; (2) the district court did not violate the Double Jeopardy Clause when it relied on pre-guidelines conduct to sentence him, because that conduct could be considered as a prior sentence under U.S.S.G. § 4A1.2(4); (3) the district court properly declined to sentence him on count 16 under the guidelines; (4) there were no cumulative errors sufficient to warrant downward departure; (5) the district court did not err when it extended its relevant conduct inquiry to all conduct within the scope of the mail fraud scheme in which he participated; and (6) Ausburn failed to show that he was denied effective counsel under Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The district court also ruled that Ausburn's argument that counsel was ineffective for failure to seek an appeal was, in part, based on his inability to predict changes in the law occurring subsequent to sentencing. The district court found that counsel was not ineffective for failure to predict such developments.

The district court thus denied Ausburn's § 2255 motion. Ausburn appealed.

### III

"Relief under . . . § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." U.S. v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). "A district court's technical application of the Guidelines does not give rise to a constitutional issue." Id. Even when a defendant alleges a fundamental constitutional error, he "may not raise an issue for the first time on collateral review without showing both `cause' for his procedural default, and `actual prejudice' resulting from the error." U.S. v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 978 (1992).

### IV

Ausburn argues that counsel was ineffective because he did not directly appeal the sentence or otherwise advise him that he had grounds upon which to base an appeal.

A claim that counsel has been ineffective will prevail only if the defendant proves that such counsel was not only objectively deficient, but also that the defendant was so prejudiced by counsel's errors that the trial was unfair or unreliable. Strickland v. Washington, 466 U.S. at 687. "Unreliability 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." Lockhart v. Fretwell, \_\_\_ U.S. \_\_\_, 113 S.Ct. 838, 844, \_\_\_ L.Ed.2d \_\_\_ (1993).

Under the first prong, an entitlement to effective assistance of counsel is not tantamount to a guarantee of error-free performance. Dozier v. U.S. Dist. Court for the Northern Dist. of Florida, 656 F.2d 990, 992 (5th Cir. 1981). Effectiveness of counsel is presumed, and even counsel's unprofessional conduct will not constitute ineffective representation unless actual prejudice results sufficient to satisfy the second prong. Strickland 446 U.S. at 691; see Lockhart v. McCotter, 782 F.2d 1275, 1279 (5th Cir. 1986), cert. denied, 479 U.S. 1030 (1987).

The second prong of Strickland thus requires a review by this Court to determine whether the result would have been different "but for counsel's unprofessional errors." Strickland, 466 U.S. at 694; see Wilkerson v. Collins, 950 F.2d 1054, 1063-64 (5th Cir.), petition for cert. filed, (Mar. 18, 1992) (No. 91-7669).

With the two prongs of Strickland in mind, we must review ineffective-assistance claims without "the distorting effects of hindsight." See Strickland, 446 U.S. at 689; Ellis v. Lynaugh, 873 F.2d 830, 839 (5th Cir.), cert. denied, 493 U.S. 970 (1989). Ausburn must therefore show that the alleged errors were so serious that he did not receive the assistance of counsel guaranteed under the Sixth Amendment and that the deficient performance so prejudiced the defense that he was subjected to an unfair trial. Strickland, 466 U.S. at 686. Ausburn has not made such a showing.

A criminal defendant has a constitutional right to effective assistance of counsel in his first appeal as of right. See Evitts v. Lucey, 469 U.S. 387, 393-95, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Where counsel does nothing beyond filing a notice of appeal, prejudice is presumed. See Lombard v. Lynaugh, 868 F.2d 1475, 1480 (5th Cir. 1989) (citation omitted).

The district court ruled that, because the grounds for appeal were based, in part, on Ausburn's reliance on a post-sentencing amendment to the guidelines commentary and case law decided after sentencing, "[c]ounsel's failure to predict these later developments in the law was not unreasonable." The district court held further that "[p]etitioner cannot now seek relief at the expense of his counsel when clearly no mistake was made."

Most important, Ausburn does not argue that he requested that his attorney file a notice of appeal. If Ausburn made such a request, prejudice is presumed where counsel fails to pursue the appeal. See Lombard, 868 F.2d at 1480. Instead, Ausburn argues loosely that counsel failed to inform him of his *right* to appeal because he failed to inform him of "grounds to do so."

The magistrate judge characterized Ausburn's argument as "conclusory" and based on a single meritless factual allegation. The Government argues that Ausburn was a "seasoned and experienced lawyer," and that the error had no effect on his conviction and sentence.



Ausburn fails to show that counsel was objectively deficient. As set forth below, the claims Ausburn asserts are meritless. Nor can Ausburn demonstrate that he was prejudiced by counsel's performance, deprived of a substantive or procedural right, or deprived of a fair trial. Ausburn's ineffectiveness claim thus fails.

V

Ausburn argues that, in the light of his guilty plea, the district court's denial of a two-point credit for acceptance of responsibility was error of constitutional magnitude. Ausburn argues further that, because the commentary to U.S.S.G. § 3E1.1 was later amended after the sentencing hearing, Congress intended that an acceptance-of-responsibility determination should afford greater significance to the fact that a defendant pleaded guilty. This argument lacks merit.

Issues involving the technical application of the Sentencing Guidelines are not normally of constitutional magnitude. See Vaughn, 955 F.2d at 368. Because Ausburn could have raised this issue on direct appeal, but did not, he is barred under Vaughn from raising it in a § 2255 motion. Nor does Ausburn's argument have any merit if it were cognizable in a § 2255 proceeding.

Although an amendment to guideline commentary that becomes effective after sentencing generally does not operate retroactively, U.S. v. Paden, 908 F.2d 1229, 1236 (5th Cir. 1990), cert. denied, 111 S. Ct. 710 (1991), this Court may apply them

retroactively on appeal. See U.S. v. Brigman, 953 F.2d 906, 908-09 (5th Cir.), petition for cert. filed, (Aug. 4, 1992) (No. 92-5417).

Even assuming *arguendo* that it were retroactive, it would not necessarily benefit Ausburn. A guilty plea does not guarantee a sentence reduction as a matter of right. See id. The district court still has broad discretion to make an independent determination whether a defendant has accepted responsibility for his criminal deeds. See Brigman, 953 F.2d at 908-09; U.S. v. Fabregat, 902 F.2d 331, 334 (5th Cir. 1990). Findings of fact by the district court regarding acceptance of responsibility are given even *greater* deference by this Court than that given under a "clearly erroneous" standard. Id.

## VI

Ausburn argues that the district court's reliance, in part, on an estimated \$2 to 5 million loss as a basis for sentencing violated his due process rights because it (1) was based on a mere guess by the U.S. Postal Inspector, (2) was premised on conduct never proven in court, (3) was never contained in the indictment, (3) dwarfs the substantive offense charging only losses of \$5,601.45, and (4) tends to punish for conduct never proven.

Because Ausburn could have directly appealed this issue, but did not, his arguments are procedurally barred by Shaid. Nor do Ausburn's arguments otherwise have any merit.

Ausburn misstates the law. Congress places "[n]o limitation" on the district court's inquiry into the "background, character,

and conduct of a person convicted of an offense ... for the purpose of imposing an appropriate sentence" under the guidelines. See 18 U.S.C. § 3661.

A determination of "relevant conduct" by the district court may include "all acts and omissions ... that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). Because Ausburn was a leader in the scheme, PSR ¶ 28, the district court could consider under § 1B1.3(a)(2) all losses attributable to the scheme as relevant to *sentencing*. Although Ausburn raised objections to the PSR, he failed to appeal the district court's adoption of the PSR's characterization of his role.

Nor did he appeal the issue regarding the PSR's estimate that losses "greatly exceeded \$5,000,000.00." In addressing the appeal of a co-defendant, this Court held that the district court correctly determined the losses attributable to the scheme, noting that the "worksheet clearly showed that under section 2F1.1(b)(91)(L), the amount of loss was estimated at over \$5,000,000." U.S. v. Arthur, 927 F.2d 601 (5th Cir.), cert. denied, 112 S.Ct. 112 (1991) (unpublished).

## VII

Ausburn also argues that the district court's reliance on pre-Guidelines conduct to determine his criminal offense category for both sentences constituted punishment twice for the same conduct in violation of double jeopardy. Ausburn grounds his argument, in

part, on the fact that the conduct alleged in count 16 was itself the basis for a separate conviction.

Because Ausburn failed to raise this issue on direct appeal, he is similarly barred under Shaid from raising it in a § 2255 motion. Nor does this issue have any merit because Ausburn misstates the law. See, e.g., U.S. v. Bigelow, 897 F.2d 160, 161 (5th Cir. 1990) (dealing with escape status as basis for enhancement).

#### VIII

Ausburn argues that the district court erred when it failed to sentence him for count 16 under the Sentencing Guidelines. In his brief on appeal, he also grounds his argument, in part, on the allegation that his offense continued to run beyond November 1, 1987, and that he had a vested right to be sentenced under the guidelines.

We need not address this issue, however, because Ausburn failed to raise it on direct appeal. Ausburn is thus barred from raising the issue under Vaughn. Nor does Ausburn's argument have merit were it cognizable in a § 2255 proceeding.

Where multiple counts charge offenses occurring both before and after November 1, 1987, the district court should not sentence counts charging conduct before that date under the sentencing guidelines. U.S. v. Garcia, 903 F.2d 1022, 1025-26 & n.5 (5th Cir.), cert. denied, 111 S.Ct. 364 (1990). The district court may also impose a sentence for a pre-guidelines count that runs

consecutive to sentences running concurrently under the guidelines.  
Id.

In count 16, the indictment charged Ausburn for conduct committed before November 1, 1987, involving his mailing of a letter "for the purpose of executing the ... scheme and artifice to defraud." On the face of the indictment, the offense was complete before November 1, 1987, and thus not subject to sentencing under the guidelines. See Garcia, 903 F.2d at 1025-26 & n.5; cf. U.S. v. White, 869 F.2d 822, 826 (5th Cir.), cert. denied, 490 U.S. 1112 (1989) (conspirators may be sentenced under the Guidelines without violating the Ex Post Facto Clause so long as the conspiracy offense continued after the effective date of the Guidelines).

Ausburn also raises the "continuing offense" issue for the first time in this appeal. Issues raised for the first time on direct appeal are reviewable by this Court only if they involve purely legal questions and failure to consider them would result in manifest injustice. See U.S. v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). Applying Garcia-Pillado to review of a § 2255 ruling, failure to consider this issue would not result in "manifest injustice."

#### IX

Ausburn argues that, because of the cumulative effect of the district court's errors, downward departure was proper in light of his prior criminal history only involving a misdemeanor conviction for failing to file a tax return. Ausburn argues further that the

error is evident because he "barely fits" into criminal history category II based on that offense.

As with the other sentencing issues, Ausburn has failed to raise this issue on direct appeal and is barred from raising it in his § 2255 motion. Ausburn's argument, in any event, is meritless.

This court upholds a district court's refusal to depart from the guidelines unless the refusal violates law. U.S. v. Buenrostro, 868 F.2d 135, 139 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990). Ausburn was sentenced within the appropriate guideline range. In light of the rejection of Ausburn's alleged claims, there was no cumulative error.

X

For the reasons stated herein, the judgment of the district court is

A F F I R M E D.