IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-1391
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD L. HUNT,

Defendant-Appellant.

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Appeal from the United States District Court for the
Northern District of Texas
(3:93-CV-247-R;CR3-84-238-R)

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(August 1, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Richard L. Hunt (Hunt) seeks a writ of habeas corpus alleging he has been denied effective assistance of counsel in violation of the Sixth Amendment to the United States

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Constitution.[1] We find no merit in his claims and affirm the district court's order denying habeas relief.

Facts and Proceedings Below

In 1983, Hunt and two accomplices formed two mail order companies, Creditsaver, Inc. and First Security Credit, and began running advertisements in such publications as *The National Enquirer* and *The Star Classified* promising:

> "Assured credit: MasterCard, Visa, and more. All available through First Security Credit regardless of past credit, no credit, bankruptcy; completely guaranteed. Women and students cards available."

See United States v. Hunt, 794 F.2d 1095, 1096-97 (5th Cir. 1986). The advertisements provided a toll-free number for further information. Those calling the number received a solicitation letter requesting employment and income information similar to an ordinary credit card application and encouraging the customer to complete and return an application along with a thirty-five dollar fee. Instead of receiving a credit card, however, applicants received a seven-page booklet entitled "Ten Easy Steps to Good Credit." *Id*. In 1985, Hunt was convicted of fourteen counts of mail fraud in violation of 18 U.S.C. § 1341. *Id*. At the initial sentencing, the district court expressed concern for the victims of the credit card scam and offered Hunt the opportunity for probation if he could submit an acceptable plan to pay restitution to his victims. *See United States v. Hunt*, 940 F.2d 130, 130 (5th Cir.

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[1] Although Hunt characterizes his pleading as a petition for habeas corpus, the relief he seeks is more appropriately viewed as a motion to vacate sentence under 28 U.S.C. § 2255 and will accordingly be considered as such.

1991). The district court accepted a proposal submitted by Hunt and ordered him to pay restitution of $264,126 in 6 installments beginning September 15, 1985, and running through July 15, 1986, as a condition of imposing concurrent 5-year terms of probation. *Id*. Despite ready access to substantial resources, Hunt had only paid $100 in restitution by 1987. *Id*. at 131. After finding that Hunt had not made a good-faith attempt to pay restitution, the district court revoked his probation, vacated the restitution order, and imposed fourteen concurrent five-year prison terms. *Id*. Hunt appealed and we affirmed. *United States v. Hunt*, No. 88-1056 (5th Cir. Sept. 21, 1988) (unpublished). Hunt then filed two motions for relief under former Fed. R. Crim. P. 35. The district court denied both motions in 1990; Hunt appealed the denial of the second motion, and we affirmed. *United States v. Hunt*, 940 F.2d 130 (5th Cir. 1991). Then in February 1993, Hunt filed the instant habeas proceeding.

Discussion

Hunt contends that the revocation of his probation and his subsequent incarceration resulted from ineffective assistance of counsel. Specifically, he claims that all four lawyers who have represented him from his initial trial through his four previous appeals before this Court failed to provide him adequate legal counsel because they neglected to object to the fact that the amount of restitution exceeded the total losses that formed the

basis of the offenses of conviction.[2]

The Supreme Court established a two-part test to evaluate claims of ineffective assistance of counsel in *Strickland v. Washington*, 104 S.Ct. 2052, 2064 (1984). In order to establish such a claim, a defendant must meet both prongs of this test. First, the defendant must show that his counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." *Id.* A lawyer's representation is deficient only if it falls below an objective standard of reasonableness, measured under prevailing professional norms. *Id.* at 2064-65. Second, the defendant must show that his defense was prejudiced by the deficient performance. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 2064. In order to establish prejudice, he must show that there is a reasonable probability that a different result would have occurred but for the deficient representation. *Id.* at 2068. In assessing counsel's decisions, we must afford his performance a high degree of deference. *Id.* at 2065.

In the present case, Hunt fails to satisfy either prong of the *Strickland* test. He alleges that the district court imposed an

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[2] The amount of the district court's restitution order ($264,126) included the entire amount Hunt and his co-defendants obtained through their credit card scam, rather than the losses incurred by the victims named in the 14 counts of Hunt's conviction ($490). *See Hunt*, 940 F.2d at 131.

illegal sentence under the Federal Probation Act[3] by conditioning probation on his paying restitution for losses other than those reflected in the counts of conviction. He relies primarily on *Hughey v. United States*, 110 S.Ct. 1979 (1990), in which the Supreme Court held that a court could not order restitution under the Victims and Witnesses Protection Act of 1982 (VWPA), 18 U.S.C. §§ 3579, 3580, in excess of the amount involved in the offense of conviction. *Id*. at 1983. In the present case, of course, the court ordered restitution pursuant to the Probation Act, rather than the VWPA. While it is uncertain whether the ruling in *Hughey* applies to the Probation Act, we need not address that issue here.[4]

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[3] The Probation Act, 18 U.S.C. § 3651 (repealed 1987), provides that a court could require the defendant, as a condition of probation, "to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . ." While the Probation Act has been repealed by the Sentence Reform Act, this section still applies to offenses committed prior to November 1, 1987. *See United States v. Balboa*, 893 F.2d 703, 706 (5th Cir. 1990).

[4] The primary concerns of *Hughey* are not implicated in the present situation. The purpose of ordering restitution under the VWPA, as the name implies, is to "restore victims to as whole a position as possible." *United States v. Satterfield*, 743 F.2d 827, 833 (11th Cir. 1984); *see also* S.Rep. No. 532, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2516, 2536). Restitution under the Probation Act serves much broader aims. A court may "suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best . . . when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby . . .." 18 U.S.C. § 3651 (repealed 1987). Often, as is the case with Hunt, a defendant will find it preferable to divulge his criminal gains rather than face imprisonment.

In addition, the conviction in *Hughey* resulted from a plea bargain agreement in which the defendant pleaded guilty to a single count of the indictment "in exchange for the Government's agreement to dismiss the remaining counts and to forgo prosecution 'for any other offense arising in the Western

The validity of the restitution order is inconsequential to Hunt's present state of incarceration. After the revocation hearing, the trial court vacated the initial probated sentence ordering restitution. At that time, Hunt had not even paid restitution for the amount he admitted he owedSQthe $490 that formed the basis of the offenses of conviction. Since the restitution order has been vacated, any question of its validity has thereby been rendered moot. *Hunt*, 940 F.2d at 131.

District of Texas as part of the scheme alleged in the indictment.'" *Hughey*, 110 S.Ct. at 1981. After the defendant had entered his plea, the court ordered him to pay restitution for losses exceeding those stated in the single count for which he pleaded guilty. *Id*. at 1982. In reversing the order, the Supreme Court emphasized that "[t]he essence of a plea agreement is that both the prosecution and the defense make concessions to avoid potential losses" and that nothing in the VWPA "suggests that Congress intended to exempt victims of crime from the effects of such a bargaining process." *Id*. at 1985. In the present case, however, the trial court allowed Hunt to *submit* a restitution plan in order to avoid imprisonment. Such an arrangement was clearly in the best interests of the defendant and the general public and was thus in line with the general purpose of the Probation Act.

Nevertheless, certain opinions of this Circuit have held that a restitution order imposed under the Probation Act must similarly be stated in terms of actual loss to the victims of the offense of conviction. *See, e.g., United State v. All Star Industries*, 962 F.2d 465, 477 (5th Cir.), *cert. denied*, *Midco Pipe & Tube, Inc. v. United States*, 113 S.Ct. 377 (1992) ("Under the Probation Act, the only limits on restitution are that repayment must relate (i) to the particular offense of which the defendant was convicted and (ii) to the actual losses suffered by the victim."); *United States v. Boswell*, 565 F.2d 1338, 1343 (5th Cir.), *cert. denied*, 99 S.Ct. 81 (1978) ("As a condition of probation, a district court undoubtedly has the authority to require that a defendant make restitution to injured parties for *actual* loss or damage caused by the offense for which he stands convicted . . .") (emphasis in original); *but see contra Hunt*, 940 F.2d at 131 ("The district court's imposition of restitution as a condition of probation was authorized under 18 U.S.C. § 3651 even though it may not have been authorized under the VWPA as interpreted by the Supreme Court in *Hughey*.").

Moreover, we do not agree with Hunt's contention that his representation was deficient for failing to raise the issue of the restitution order's validity, nor do we believe he was prejudiced by his counsel's decision. Hunt agreed to pay restitution in order to avoid imprisonment. His counsel was not ineffective for failing to raise the issue on direct appeal because vacation of Hunt's sentence on that ground would have very likely resulted in the imposition of a prison term. In denying Hunt's section 2255 motion, the district court emphasized that had it not been for the efforts of his trial counsel, "*Hunt would have been sentenced to a prison term of eight years instead of probation*." *United States v. Hunt*, No. 3:84-CR-238-R at 2 (N.D. Tex. Mar. 24, 1993) (emphasis in original). The court also noted that, after the revocation hearing, it would have sentenced him to eight years' imprisonment, rather than five, had it not been for the "excellent representation" afforded by his counsel. *Id*. Given Hunt's ability to pay restitution, a reasonable attorney would have accepted the restitution offer to avoid exposing his client to a potential eight-year prison term.[5] Because Hunt did not raise the amount of restitution as an issue on direct appeal, his subsequent counsel was foreclosed from raising it as an issue on appeal of the revocation of probation. *United States v. Caddell*, 830 F.2d 36, 38 (5th Cir. 1987).

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[5] Hunt's arguments on appeal concerning whether he made partial restitution or knew that the probation department would accept partial payment were not raised in the district court and hence will not be considered. *See United States v. Cates*, 952 F.2d 149, 152 (5th Cir.), *cert. denied*, 112 S.Ct. 2319 (1992).

Conclusion

The judgment of the district court is

AFFIRMED.