[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11585
Non-Argument Calendar

D.C. Docket Nos. 1:17-cv-00057-AW-GRJ,
1:12-cr-00042-GRJ-1

ROBERT BRANDON BILUS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(August 11, 2021)

Before WILSON, ROSENBAUM, and BRANCH, Circuit Judges.

PER CURIAM:

Robert Brandon Bilus, a federal prisoner serving a 168-month sentence after a jury convicted him of receiving and attempting to receive child pornography, appeals from the district court's denial of his 28 U.S.C. § 2255 motion to vacate sentence. Bilus argues on appeal that trial counsel was constitutionally ineffective when he: (1) failed to alert the district court to a proposed amendment to U.S.S.G. § 5G1.3; (2) failed to pursue a conditional guilty plea and misadvised Bilus that the only way to preserve the issues raised in his motion to suppress was to go to trial; and (3) misadvised Bilus about the elements of 18 U.S.C. § 2252A(a)(2).[1] After careful review, we affirm.

I. Background

In 2012, Bilus was indicted for knowingly receiving and attempting to receive child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1) (Count One), and knowingly possessing and accessing with intent to view child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2) (Count Two). Bilus, through counsel, filed motions to suppress evidence seized from his vehicle following a traffic stop and from his home pursuant to a search warrant, which the

[1] We granted a certificate of appealability ("COA") on the following issues: (1) whether trial counsel was ineffective for failing to alert the district court to a proposed amendment to U.S.S.G. § 5G1.3; and (2) whether trial counsel was ineffective for (a) failing to pursue a conditional guilty plea; and (b) misadvising Bilus as to the elements of 18 U.S.C. § 2252A(a)(2).

district court denied. Bilus proceeded to trial and the jury found him guilty as charged.[2]

Using the 2012 Guidelines manual, the United States Probation Office determined that Bilus's total offense level was 33, which when combined with his criminal history category of I, resulted in a guidelines range of 135 to 168 months' imprisonment.[3] Bilus's sentencing hearing was originally scheduled to take place in August 2013. However, between August 2013 and March 2014, Bilus's sentencing hearing was continued at least six times.[4] Bilus's sentencing hearing took place in May 2014.

At the sentencing hearing, following lengthy argument by the parties, the district court sentenced Bilus to concurrent terms of 168 months' imprisonment as

[2] Evidence at trial established that Florida police pulled Bilus's vehicle over after he failed to use a turn signal and because his vehicle matched a 911 report that a suspicious vehicle had been circling the block in a residential neighborhood late at night on a Sunday. *United States v. Bilus*, 626 F. App'x 856, 859–60 (11th Cir. 2015). Officers observed a "very young" female child in the passenger seat wearing nothing but a t-shirt and holding her hands over her genital area. *Id.* at 860. Bilus admitted to police that he had just met the girl online, and that he believed she was 16 years' old (the child was actually 12 years' old). *Id.* at 860–61. Bilus was arrested and charged with the Florida misdemeanor of contributing to the delinquency of a child. *Id.* at 860. After learning of Bilus's arrest, the Internet Crimes Against Children Task Force obtained a search warrant for Bilus's residence to look for the computer that had been used to communicate and arrange a meeting with the young girl. *Id.* at 861. A search of Bilus's computer, pursuant to the search warrant, uncovered 37 files depicting child pornography, which led to the underlying federal charges. *Id.* at 862.

[3] Count 1 carried a statutory maximum term of 20 years' imprisonment and Count 2 carried a statutory maximum of 10 years' imprisonment.

[4] Bilus moved four times successfully to continue the sentencing hearing and the government moved successfully twice.

to Count One and 120 months' imprisonment as to Count Two, followed by lifetime terms of supervised release. Bilus's counsel requested that the district court order the federal sentence to run concurrent with any subsequent sentence that Bilus might receive for his state convictions pursuant to the Supreme Court's then-recent decision in *Setser v. United States*, 566 U.S. 231, 245 (2012), which held that district courts have discretion to order a defendant's sentence to run consecutively or concurrently to an anticipated state sentence.[5] Counsel noted that, if the district court did not enter such an order, the federal Bureau of Prisons would run the sentences consecutively. The government opposed the motion, stating that how the sentences should run was a matter that should be decided by the state court judge. The district court denied Bilus's request, stating that it was going to leave the issue "up to the state judge" because the offenses before the district court for child pornography were "distinct" from the state offenses related to the traffic stop involving Bilus and the "young girl."[6]

[5] Bilus was represented by the same counsel in both his federal and his state proceedings. At the time of his federal sentencing, Bilus had been convicted in state court of other offenses related to his encounter with the young girl discovered in his truck—interference with custody, lewd and lascivious battery on a person under 16 years' of age, and traveling to meet a minor—and was awaiting state sentencing. *Bilus*, 626 F. App'x at 862.

[6] Bilus was later sentenced in the state prosecution to concurrent terms of five years' imprisonment for the interference with custody count, and fourteen years' imprisonment, respectively, for the lewd and lascivious battery on a person under the age of 16 count, and the traveling to meet a minor count. The state court judgment remained silent as to whether the state sentences should be run concurrently or consecutively with the federal sentence.

On direct appeal of his federal convictions, we affirmed his conviction and sentence as to Count One, and we reversed his conviction as to Count Two, based on the government's concession that possession of child pornography was a lesser-included offense of receiving child pornography, as alleged in Count One. *Bilus*, 626 F. App'x at 870. On remand, the district court entered an amended judgment imposing the same sentence as to Count One and dismissing Count Two.

In February 2016, Bilus filed a motion for *de novo* resentencing, requesting that the district court reconsider the issue of the concurrency of his federal and state sentences because the state court judge had declined to address the issue at sentencing. The district court denied the motion, explaining that the state offenses were based on Bilus's travel to meet a child and the child was not depicted in any of the child pornography found on his computer. Thus, the district court reiterated that because the federal offense was distinct from Bilus's state crimes it declined to run his federal sentence concurrent to his state sentence.

Subsequently, Bilus filed a timely counseled § 2255 motion, arguing, in relevant part, that his trial counsel was ineffective for: (1) failing to alert the district court at sentencing to a proposed amendment to U.S.S.G. § 5G1.3 that would have qualified him for concurrent sentences for his state and federal sentences; (2) failing to pursue a conditional guilty plea and misadvising Bilus that the only way to preserve the issues raised in his motion to suppress was to go to

trial; and (3) misadvising Bilus about the elements of 18 U.S.C. § 2252A(a)(2). Following the government's response and Bilus's reply, the district court ordered an evidentiary hearing on claims 2 and 3.

Both Bilus and his trial counsel testified at the evidentiary hearing.[7] Following the evidentiary hearing, the magistrate judge issued a report and recommendation ("R&R"), recommending that the district court deny Bilus's § 2255 motion on the merits. The district court adopted the R&R over Bilus's objections. Bilus now appeals the denial of his § 2255 motion.

II. Standards of Review

In reviewing the denial of a § 2255 motion to vacate a sentence, "we review legal conclusions *de novo* and findings of fact for clear error." *Spencer v. United States*, 773 F.3d 1132, 1137 (11th Cir. 2014) (en banc) (quotation omitted). Whether trial counsel was ineffective is a mixed question of law and fact that is reviewed *de novo*. *Payne v. United States*, 566 F.3d 1276, 1277 (11th Cir. 2009).

III. Discussion

Bilus argues that his trial counsel was constitutionally ineffective when he: (1) failed to alert the district court to a proposed amendment to U.S.S.G. § 5G1.3;

[7] When necessary, this opinion will discuss relevant testimony from the evidentiary hearing in the analysis of Bilus's claims.

(2) failed to pursue a conditional guilty plea; and (3) misadvised Bilus about the elements of 18 U.S.C. § 2252A(a)(2).

To succeed on a claim of ineffective assistance of counsel, a defendant bears the burden to prove both that his counsel's performance was deficient and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure to establish either prong is fatal to an ineffective assistance claim and makes it unnecessary to consider the other. *Id.* at 697.

In order to satisfy the deficient performance prong, the movant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* In conducting our review, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* Thus, to overcome the presumption of competent representation, "a petitioner must establish that no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 518 F.3d

1291, 1301 (11th Cir. 2008) (quoting *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc)).

The prejudice prong requires the movant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.[8] "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). With these principles in mind, we turn to Bilus's claims.

1. Whether trial counsel was ineffective when he failed to alert the district court to a proposed amendment to U.S.S.G. § 5G1.3

Bilus argues that his trial counsel was ineffective when he failed to alert the district court at sentencing of a proposed amendment to U.S.S.G. § 5G1.3, which was set to take effect approximately six months after his sentencing hearing in November 2014. He maintains that he suffered prejudice because the amendment

[8] It is well-established that the Sixth Amendment right to counsel extends to pleas and the plea negotiation process. *See Lafler v. Cooper*, 566 U.S. 156, 162–64 (2012); *see also Missouri v. Frye*, 566 U.S. 134 (2012). Thus, in the context of an ineffective-assistance claim where a movant asserts that trial counsel's erroneous advice led to the rejection of a plea offer, in order to establish prejudice, the movant must show that there is a reasonable probability that (1) he would have accepted a plea offer had counsel advised him correctly; (2) the prosecutor would not have withdrawn the offer; (3) the trial court would have accepted the offer; and (4) the plea would have resulted in a lesser charge or lower sentence. *Lafler*, 566 U.S. at 163–64. However, when as in this case, "no plea offer [was] made," the standard set forth in *Lafler* does not apply. *Id.* at 168.

would have applied to him, and it would have required the district court to impose his federal sentences concurrently to his yet to be determined state sentences.

At the time of Bilus's sentencing, U.S.S.G. § 5G1.3(b) provided direction to a federal sentencing court as to whether the sentence it was imposing should run concurrently or consecutively to a defendant's undischarged term of imprisonment. *See generally* U.S.S.G. § 5G1.3(b). The guideline provided that a federal sentence "shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment" if "a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction" under U.S.S.G. § 1B1.3 and that conduct "was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)." U.S.S.G. § 5G1.3(b) (2012). Bilus does not dispute that he did not meet § 5G1.3's criteria at the time of his sentencing.[9]

The Sentencing Commission issued its proposed amendments to § 5G1.3 in January 2014, approximately four months prior to Bilus's sentencing. *See* Proposed Amendments to the Sentencing Guidelines, U.S.S.G., January 14, 2014. The amended version of § 5G1.3, effective November 1, 2014, encompassed both

[9] At the time of his federal sentencing, Bilus had been convicted in state court but was awaiting sentencing. Thus, he was not subject to an undischarged term of imprisonment. Additionally, the state offenses were not used to increase Bilus's offense level under the guidelines. Accordingly, U.S.S.G. § 5G1.3 did not apply to him.

undischarged terms of imprisonment and an anticipated state term of imprisonment. *See* U.S.S.G. § 5G1.3(c) (2014). It provided that, if "a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction" under certain provisions of U.S.S.G. § 1B1.3, "the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment." *Id.* The amended version of § 5G1.3 would have applied to Bilus.

Bilus failed to establish prejudice. There is not a reasonable probability that had counsel raised the proposed amendment to § 5G1.3, that the district court would have continued the sentencing for an additional six months until the amendment became effective—particularly in light of the fact that Bilus's sentencing had been continued at least six prior times for almost a year. *See Harrington*, 562 U.S. at 112 (explaining that for purposes of prejudice under *Strickland*, "[t]he likelihood of a different result must be substantial, not just conceivable."). Furthermore, although counsel did not bring up the proposed amendment to U.S.S.G. § 5G1.3, counsel requested that the district court exercise its authority to order that Bilus's federal sentence run concurrently to the anticipated state sentences. The district court, however, declined the request, explaining that, in its view the federal child pornography offense was distinct from the conduct underlying the state offenses that involved the minor child discovered

in Bilus's truck during a traffic stop; therefore, the decision as to whether the sentences should run consecutively or concurrently was a decision best left to the state court. Thus, based on the district court judge's comments at sentencing, even assuming arguendo that counsel had raised the issue and the district court had continued the sentencing until November 2014, there is not a reasonable probability that the court would have applied the guideline and imposed the federal sentence concurrently to the anticipated state sentences. *See United States v. Henry*, 1 F.4th 1315, 1322–23 (11th Cir. 2021) (holding that U.S.S.G. § 5G1.3 is not binding because the Guidelines are advisory—meaning that when the guideline applies, the district court must consider the guideline, but then is free to exercise its discretion to impose the sentence that it deems most appropriate). Accordingly, because Bilus failed to establish prejudice, he is not entitled to relief on this claim. *Strickland*, 466 U.S. at 697.

2. Whether trial counsel was ineffective for failing to pursue a conditional guilty plea

Bilus argues that his counsel was constitutionally ineffective when he failed to pursue a conditional guilty plea and advised Bilus that the only way that he could appeal the motion to suppress ruling was if he went to trial. He maintains that he was prejudiced by counsel's deficient performance because, if he had known about the option of pursuing a conditional guilty plea, he "would have

absolutely entered a guilty plea," which would have resulted in a lower sentence because he would have received a reduction for acceptance of responsibility.

The district court credited counsel's testimony—that he advised Bilus that he could preserve the motion to suppress issue even if he pleaded guilty—over Bilus's testimony to the contrary. We give substantial deference to the district court's credibility determinations with respect to witness testimony in a § 2255 proceeding. *Rivers v. United States*, 777 F.3d 1306, 1316–17 (11th Cir. 2015); *Carr v. Schofield*, 364 F.3d 1246, 1264–65 (11th Cir. 2004) (explaining that the determination of credibility of witnesses during an evidentiary hearing on an ineffective-assistance-of-counsel claim is "within the province of the district court, which has the opportunity to observe and study the witness"). Thus, we will not "disturb a credibility determination unless it is so inconsistent or improbable on its face that no reasonable factfinder could accept it." *Rivers*, 777 F.3d at 1317 (quotation omitted). Because the district court's credibility determination was not inconsistent or improbable on its face, we defer to it. As a result of this credibility determination, Bilus cannot show that his counsel rendered deficient performance based on his advice to Bilus concerning a conditional guilty plea.

Additionally, as the district court found, the government made no plea offer in Bilus's case.[10] Thus, his contention that his counsel could have negotiated, or that he otherwise would have entered, a conditional guilty plea is purely speculative. The Federal Rules of Criminal Procedure provide that a defendant may enter a conditional guilty plea, but only upon "the consent of the court and the government." *See* Fed. R. Crim. P. 11(a)(2). The government's consent must be express. *United States v. Pierre*, 120 F.3d 1153, 1156 (11th Cir. 1997). Nothing in the record supports Bilus's assertion that the district court and the government would have agreed to a conditional guilty plea "straight up" or via a plea agreement. *See also Zamora v. Dugger*, 834 F.2d 956, 960 (11th Cir. 1987) (explaining that it is purely within the prosecution's discretion whether to plea bargain, and that counsel cannot force the prosecutor to do so).

Furthermore, counsel testified that Bilus "was far more adamant about going to trial than he was [about] pleading [guilty]." And counsel testified that he believed that there was a chance that Bilus could win at trial because "there were a number of legitimate factual issues," including the fact that Bilus's computer was seized from his apartment that he shared with other individuals and the fact that the government's expert conceded that he could not say how the images got on the

[10] During the district court proceedings, Bilus alleged that he believed the government had offered him a plea of 14 years' imprisonment, but he acknowledges on appeal that the evidence presented in the district court proceeding established that no such offer actually existed.

computer nor whether they were ever viewed. Under these circumstances, Bilus failed to show that no competent counsel would have taken the action that his counsel took by proceeding to trial. *See Gordon*, 518 F.3d at 1301. Accordingly, Bilus failed to establish deficient performance.

Similarly, Bilus cannot establish prejudice. Bilus argues that, if he "had known about the option of pursuing a conditional guilty plea," he "would have absolutely entered a guilty plea." But the district court's credibility determination establishes that Bilus knew about the possibility of a conditional guilty plea and yet proceeded to trial. Regardless, even assuming arguendo that he did not know about the possibility of a conditional guilty plea, Bilus's assertion that he would have received a two-point reduction for acceptance of responsibility if he had pleaded guilty is based on pure speculation. As discussed previously, no plea offer or agreement was made in his case, and the commentary to U.S.S.G. § 3E1.1 explains that "[a] defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right." U.S.S.G. § 3E1.1, cmt. n.3. Given this commentary and the fact that "only the district court determines the guideline range," *United States v. Boyd*, 975 F.3d 1185, 1190 (11th Cir. 2020), the likelihood that Bilus would have received a guidelines reduction under § 3E1.1 is

at best only conceivable, which is insufficient to establish prejudice.[11] *See Harrington*, 562 U.S. at 112 (explaining that, for purposes of *Strickland* prejudice, "[t]he likelihood of a different result must be substantial, not just conceivable"). Accordingly, because Bilus failed to meet *Strickland*'s two-part test, the district court did not err in denying relief on this claim.

3. Whether counsel was ineffective for misadvising Bilus as to the elements of 18 U.S.C. § 2252A(a)(2)

Bilus argues that his trial counsel rendered ineffective assistance when he misadvised Bilus that, in order to convict him, the government would have to prove that Bilus viewed the child pornography found on his computer. Bilus maintains that he was prejudiced because, but for counsel's erroneous advice, he would not have gone to trial, and he would have pleaded guilty.

Even assuming arguendo that counsel performed deficiently under *Strickland*, Bilus's claim fails. Bilus's prejudice allegations in the district court differed from his allegations on appeal. In his § 2255 motion, Bilus argued that he was prejudiced because "[a]s a result of trial counsel's misadvice, [he] rejected the government's plea offer." The district court concluded that Bilus could not

[11] Because our precedent is clear that "only the district court determines the guideline range," Bilus's counsel's testimony at the evidentiary hearing that he believed that Bilus would have received a two-point reduction for acceptance of responsibility if he had pleaded guilty is insufficient to establish that there was a substantial likelihood—as opposed to merely a conceivable likelihood—of a different result. *Boyd*, 975 F.3d at 1190.

establish prejudice because there was no plea offer, and even assuming there was an alleged offer, he received the same sentence of 14 years' imprisonment that he claimed was made in the plea offer. In his reply brief, Bilus concedes that, although he believed there was a plea offer, "as admitted during the evidentiary hearing, there was never an alleged plea offer from the government." Nevertheless, he maintains that he can establish prejudice because, had he entered a conditional guilty plea, he would have received a guidelines reduction for acceptance of responsibility, resulting in a lower guideline range and a lesser sentence. Bilus failed to assert the latter prejudice argument properly in the district court.[12] Having discovered that there was in fact no plea offer ever made (which was the basis of his prejudice allegation below), Bilus cannot shift gears on appeal

[12] Bilus's counsel raised this argument in Bilus's objections to the R&R, asserting that, because it was revealed during the evidentiary hearing that there was no plea offer, "the prejudice the [district court] should look at is the actual prejudice suffered by Mr. Bilus"—meaning "what would have happened to Mr. Bilus had he actually entered a conditional plea and waived his right to trial." But this argument came too late. *See Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009) (holding that "a district court has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge"). As the First Circuit emphasized in *Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co.*, 840 F.2d 985, 991 (1st Cir. 1988),

> [t]he role played by magistrates within the federal judicial framework is an important one. They exist to assume some of the burden imposed on the district courts by a burgeoning caseload. The system is premised on the notion that magistrates will relieve courts of unnecessary work. Systemic efficiencies would be frustrated and the magistrate's role reduced to that of a mere dress rehearser if a party were allowed to feint and weave at [the first round], and save its knockout punch for the second round. In addition, it would be fundamentally unfair to permit a litigant to set its case in motion before the magistrate, wait to see which way the wind was blowing, and—having received an unfavorable recommendation—shift gears before the district judge.

to assert a new basis for establishing prejudice in order to sustain his ineffective-assistance-of-counsel claim. *See Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001) ("The petitioner bears the burden of proof on the 'performance' prong as well as the 'prejudice' prong of a *Strickland* claim, and both prongs must be proved to prevail."); *Johnson v. United States*, 340 F.3d 1219, 1228 n.8 (11th Cir. 2003) (holding that § 2255 movant's argument raised for the first time on appeal was waived).

In any event, as discussed previously, Bilus's assertion that he would have received a two-point reduction for acceptance of responsibility if he had pleaded guilty and therefore necessarily a lesser sentence is based on pure speculation.[13] At best, the likelihood of a different result is merely conceivable, which is insufficient to establish prejudice. *See Harrington*, 562 U.S. at 112 (explaining that, for purposes of *Strickland* prejudice, "[t]he likelihood of a different result must be substantial, not just conceivable"). Accordingly, the district court did not err in denying relief on this claim.

[13] Although Bilus's counsel testified at the evidentiary hearing that the prosecutor had told him that, if Bilus entered a guilty plea "straight up," Bilus would "get two levels for acceptance of responsibility," the likelihood that Bilus would have received a lesser sentence is still only merely conceivable because the government does not have the ability to guarantee a defendant will receive the guidelines reduction for acceptance of responsibility. Rather, as noted above, "only the district court determines the guideline range." *Boyd*, 975 F.3d at 1190. Therefore, the prosecutor's statements about what reductions Bilus would receive under the Guidelines does not make Bilus's claim any less speculative.

IV. Conclusion

For the foregoing reasons, we affirm the district court's denial of Bilus's § 2255 motion.

AFFIRMED.