In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2935

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAULA R. HISE,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Illinois.
No. 20-cr-40072-JPG-1 — **J. Phil Gilbert,** *Judge*.

ARGUED SEPTEMBER 14, 2022 — DECIDED APRIL 17, 2023

Before EASTERBROOK, ROVNER and ST. EVE, *Circuit Judges*.

ROVNER, *Circuit Judge*. On August 20, 2020, a grand jury returned a two-count indictment charging Paula R. Hise with two counts of wire fraud, in violation of 18 U.S.C. § 1343. Hise was employed by the victim as an office manager and bookkeeper for his construction company for more than 12 years, and an investigation by the Federal Bureau of Investigation revealed that Hise had embezzled over $1.5 million from that company. As part of that conduct, Hise obtained a

fraudulent credit card in her name and the name of the business, and caused electronic transfers of funds from the business account to pay the balance on that credit card. Hise entered an open guilty plea to those charges and the district court sentenced her to 63 months' imprisonment and three years of supervised release, to be served concurrently for each count. The court also ordered $200 in special assessments and $1,550,379.14 in restitution, subject to set-off amounts to be determined at a later hearing. The parties subsequently agreed to the set-off amount of $21,953.55, which reflected the proceeds of a Sheriff's Sale, and a revised Presentence Investigation Report ("PSR") was prepared with a restitution amount of $1,528,425.51 incorporating that set-off. The court then entered a judgment including that revised restitution amount.[1]

[1] Because the district court decided the restitution issue after its initial sentencing decision and Hise's notice of appeal, Hise was required to file a second notice of appeal to challenge the restitution order on appeal. See *Manrique v. United States*, 137 S. Ct. 1266, 1272–73 (2017). That notice of appeal requirement can be satisfied by other documents in the record such as an appellate brief, see *Smith v. Barry*, 502 U.S. 244, 245 (1992), but the timing of such filing is at issue here, as no such notice appears to have been filed within the 14-day period specified by Federal Rule of Appellate Procedure 4(b)(1)(A)(i). We have held, however, that the Rule 4(b) time limits for appeals by defendants in criminal cases are not jurisdictional, but rather are claims-processing rules that can be waived or forfeited. *United States v. Neff*, 598 F.3d 320, 322–23 (7th Cir. 2010). Therefore, the timeliness issue does not impact our jurisdiction, and as the government did not raise the timeliness of the notice of appeal here, we need not address the issue further. See *Manrique*, 137 S. Ct. at 1274 (noting that "[t]he filing of a notice of appeal from an amended judgment imposing restitu-

(continued)

Hise raises two challenges on appeal. First, she asserts that the district court violated Federal Rule of Criminal Procedure 32(i)(1)(A) and(C) in that it failed to ensure that Hise and her attorney had read and discussed the amended PSR and any addendum to it prior to imposing the sentence. Rule 32(i)(1)(A) requires the court, at sentencing, to "verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report," and subsection (C) of that provision provides that the court "must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence." Neither of those provisions were violated here.

As we have repeatedly recognized, in order to comply with those rules "'[t]he district court at the sentencing hearing need directly ask the defendant only three questions – whether he or she has had an opportunity to read the report, whether the defendant and defense counsel have discussed the report and whether the defendant wishes to challenge any facts in the report.'" *United States v. Jarigese*, 999 F.3d 464, 472 (7th Cir. 2021), quoting *United States v. Rone*, 743 F.2d 1169, 1174 (7th Cir. 1984). Although such questioning is important in the "focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence," remand is unnecessary if the error in failing to do so was harmless. *Jarigese*, 999 F.3d at 472 (internal quotation marks omitted); *United States v. Rodriguez-Luna*, 937

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tion is at least a mandatory claim-processing rule, … meaning that the requirement to file such a notice is unalterable, so long as the opposing party raises the issue.").

F.2d 1208, 1213 (7th Cir. 1991). Thus, for instance, we have found no reversible error where a defendant did not deny that she had an opportunity to review the report and disputed issues were addressed by the district court. *United States v. Wagner*, 996 F.2d 906, 916 (7th Cir. 1993). Similarly, we have found harmless error where the defendant identified a factual error in the PSR that he was not given an opportunity to contest, but that fact was correctly stated at the sentencing hearing and the district court did not rely on the fact in determining his sentence. *Jarigese*, 999 F.3d at 472.

Hise acknowledges that she and her attorney were provided with an opportunity to review the PSR and make comments on it in its initial form, and the record reflects that the district court provided both of them with an opportunity to assert any objections to it. She claims, however, that no such opportunity was provided as to the revised PSR, and argues that there is a likelihood that timely objections would have resulted in a lower sentence and restitution amount and therefore that the court's error resulted in prejudice to her. Despite that contention, Hise fails to identify on appeal *any* objection that could have been made to the revised PSR. She has not pointed to any aspect of the PSR that was incorrect or which could be subject to an objection. Therefore, she has failed to provide any support for her bare allegation that timely objections would have impacted her sentence or restitution amount.

Moreover, the record further reveals the absence of any error or prejudice. The only revision to the PSR was a reduction in the restitution amount to reflect a set-off. That set-off amount was stipulated to by Hise and her attorney, and therefore Hise had no basis to object to that set-off—which reduced

the amount she owed in restitution. Because the revised PSR was otherwise unchanged from the prior version, and reflected an agreed-upon fact, the record reveals that there was no error and no possible prejudice in the mere inclusion of the stipulated amount.

Hise's second argument related to that revised PSR fails as well. She argues that she was denied her right to be represented by counsel because her attorney failed to make any objection to the PSR and failed to appear at the final determination hearing regarding the imposition of the final restitution amount against Hise. "In evaluating an ineffective-assistance claim, the benchmark is 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Shannon v. United States*, 39 F.4th 868, 877 (7th Cir. 2022), quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the familiar *Strickland* test, to demonstrate ineffective assistance of counsel as so alleged Hise must show that her attorney's failure to object constituted deficient performance, and that the deficient performance prejudiced her. *Strickland*, 466 U.S. at 687.

We have repeatedly emphasized that raising a claim of ineffective assistance of counsel on direct appeal is almost always imprudent. See *United States v. Cates*, 950 F.3d 453, 456 (7th Cir. 2020); *United States v. Flores*, 739 F.3d 337, 341 (7th Cir. 2014). A district court record on direct appeal is unlikely to contain evidence showing conclusively whether a lawyer's representations were inadequate and affected the outcome, whereas by waiting to assert such claims in a collateral attack a defendant can compile a full record in proceedings aimed at developing the facts relevant to an ineffective-assistance

claim. *Cates*, 950 F.3d at 457. As we have in past cases, we apprised counsel of that risk of pursuing the claim on direct appeal, and asked whether Hise was aware of that risk and wanted to proceed despite it. See, e.g., *Flores*, 739 F.3d at 342. Counsel for Hise confirmed that Hise had been informed of the risk and chose to pursue the claim on direct appeal, and therefore we examine the claim in light of the record before us.

On this record, Hise has failed to adequately allege any claim of ineffective assistance. As to her claim based on her attorney's failure to object to the PSR, we have already held that she has failed to identify any objection which could have been made to the PSR, let alone an error that resulted in prejudice. She argues in the alternative that her right to an attorney was violated by her attorney's failure to appear at the hearing implementing the revised restitution amount which included the set-off, resulting in an effective denial of counsel altogether. As support for that argument, Hise relies on the Supreme Court's opinion in *United States v. Cronic*, 466 U.S. 648 (1984). In *Cronic* and subsequent cases, the Supreme Court recognized that prejudice can be presumed in certain Sixth Amendment contexts, including "'if the accused is denied counsel at a critical stage of his trial,' *United States v. Cronic*, 466 U.S. 648, 659 (1984), or left 'entirely without the assistance of counsel on appeal,' *Penson v. Ohio*, 488 U.S. 75, 88 (1988) …[or] 'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.' *Cronic*, 466 U.S. at 659." *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019); *Lewis v. Zatecky*, 993 F.3d 994, 1002 (7th Cir. 2021). Hise has raised no circumstances that fall within those categories or are in any way analogous to such circumstances. She alleges only that her

counsel was not present at an appearance in which a stipulated agreement was entered by the court—a *pro forma* action. She does not even raise any objection to the stipulated agreement entered which calculated a set-off amount that lowered the restitution amount. It is not enough to cite, without further analysis, to *Cronic* and its holding that a showing of prejudice is not necessary for "situations in which counsel has entirely failed to function as the client's advocate" during a critical stage of the proceedings. *Florida v. Nixon*, 543 U.S. 175, 189 (2004); *Lewis*, 993 F.3d at 1003. Hise must make an argument that the facts in this case evidence the type of failure of representation "so profound that prejudice is inherent in the situation." *Lewis*, 993 F.3d at 997. She fails to present any such argument whatsoever. Hise has not identified any deficient performance or prejudice in the failure to personally appear for the entry of a stipulated order.

Finally, Hise argues that her sentence, although within the Guidelines range, was nevertheless excessive and was grossly disproportionate to the offense in violation of the Eighth Amendment of the Constitution. She argues that a sentence of 63 months' imprisonment and restitution of over $1.5 million for two counts of wire fraud which involved transactions totaling $4,104.05 is disproportionate when compared with wire fraud cases of similar amounts. That argument is conclusory, because Hise fails to identify any other wire fraud cases at all. Moreover, at sentencing, the court determined that the actual loss to the victim was over $1.5 million, and Hise does not object to that calculation. A sentence within the Guidelines range is presumptively reasonable, and the court properly considered the § 3553 factors in determining the sentence. Hise's conclusory argument that the sentence is disproportionate is without legal support and is meritless.

The decision of the district court is AFFIRMED.