

SEP 28 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff - Appellee,</p> <p>v.</p> <p>EVANGELOS DIMITRIOS SOUKAS,</p> <p>Defendant - Appellant.</p>
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No. 08-35539

D.C. No. 2:07-cv-01738-JLR

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Submitted September 13, 2010**

Before: SILVERMAN, CALLAHAN, and N.R. SMITH, Circuit Judges.

Federal prisoner Evangelos Dimitrios Soukas appeals from the district court's order denying his motion under 28 U.S.C. § 2255. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Soukas contends that his appellate counsel was ineffective because she did not challenge the district court's failure to calculate Soukas' criminal history category on direct appeal. In light of the district court's comments at sentencing, Soukas cannot show "a reasonable probability that he would have received a different sentence" but for the district court's failure to calculate his criminal history category. *See United States v. Dallman*, 533 F.3d 755, 762 (9th Cir. 2008) (applying plain error analysis where counsel failed to object to procedural error at sentencing). Accordingly, Soukas cannot show a reasonable probability that he would have prevailed on direct appeal, and his ineffective assistance of appellate counsel claim fails. *See Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989).

AFFIRMED.