IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14232-F

JONATHAN R. CURSHEN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because appellant has failed to satisfy *Slack*'s test, the motion for a certificate of appealability is DENIED. Also, Curshen's motion for appointment of counsel is DENIED AS MOOT.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

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JONATHAN R. CURSHEN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: TJOFLAT and MARCUS, Circuit Judges.

BY THE COURT:

Jonathan R. Curshen has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated May 7, 2018, denying his motion for a certificate of appealability and denying as moot his motion for appointment of counsel in the appeal of the district court's denial of his 28 U.S.C. § 2255 motion to vacate his sentence. Because Curshen has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case Number: 15-24718-CIV-MARTINEZ-WHITE
(Case Number: 11-20131-CR-MARTINEZ)

JONATHAN RANDALL CURSHEN,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

THE MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, for a Report and Recommendation on Movant's *pro se* motion to vacate filed pursuant to 28 U.S.C. § 2255 [ECF No. 1]. Magistrate Judge White filed a Report and Recommendation [ECF No. 25], recommending that (a) motion to vacate sentence be denied; (b) no certificate of appealability be issued; and (c) the case be closed. The Court has reviewed the entire file and record and has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present. The Court finds the issues raised in Movant's objections are already addressed in Magistrate Judge White's Report and Recommendation. After careful consideration, it is hereby:

ADJUDGED that United States Magistrate Judge White's Report and Recommendation [ECF No. 25] is **AFFIRMED** and **ADOPTED**. Accordingly, it is:

ADJUDGED that Movant's *pro se* motion to vacate filed pursuant to 28 U.S.C. § 2255 [ECF No. 1] is **DENIED**. A certificate of appealability is **DENIED**. This case is **CLOSED,** and all pending motions are **DENIED** as **MOOT.**

DONE AND ORDERED in Chambers at Miami, Florida, this 28 day of July, 2017.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge White
All Counsel of Record
Jonathan Randall Curshen, *pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-24718-CV-MARTINEZ
(11-20131-CR-MARTINEZ)
MAGISTRATE JUDGE P. A. WHITE

JONATHAN RANDALL CURSHEN, :

Movant, :

v. : REPORT OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA, :

Respondent. :

Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking his sentence entered after he was convicted of conspiracy to commit wire fraud, mail fraud and conspiracy to commit money laundering in case no. 11-20131-CR-MARTINEZ.

The Court has reviewed the movant's amended motion (Cv-DE#12), the government's response with multiple exhibits (Cv-DE# 15), the movant's replies, the Presentence Investigation Report (PSI), and all pertinent portions of the underlying criminal file.

Construing the movant's claims liberally as afforded *pro se* litigants, pursuant to Haines v. Kerner, 404 U.S. 419 (1972), the movant appears to raise the following claims (verbatim):

1. The court erred in commencing the guidelines starting point.

2. The court failed to ensure that victim losses for enhancement were properly apportioned.

3. Error was committed in assessing criminal history points for a conviction that constituted relevant conduct to the Miami case.

4. Ineffective assistance of counsel:

   a. Trial counsel's failure to timely share discovery, discuss case and investigate case.

   b. Trial counsel's failure to interview and use potential defense witnesses that were provided to him by [movant].

   c. Trial counsel's failure to object to criminal history calculation at sentencing.

   d. Trial counsel's failure to ensure that movant's relevant conduct was determined on the profits of the sale of CO2 Tech stock rather than on the proceeds from the sale of CO2 Tech stock.

   e. Appellate counsel's failure to appeal the role in the offense enhancement imposed at sentencing.

   f. Appellate counsel's failure to appeal the intended loss and number of victims attributed to [movant] at sentencing.

   g. Appellate counsel's failure to appeal the erroneous calculation of movant's criminal history category.

Procedural History

The procedural history of the underlying criminal case reveals that the movant was charged by superseding indictment with conspiracy to commit wire, mail and securities fraud (Count 1); mail fraud (Count 6 and 8); and conspiracy to commit money laundering (Count 10). There were numerous defendants charged in the indictment. Four co-defendants enter guilty pleas and three co-defendants were fugitives. Only the movant and one co-defendant

proceeded to trial.

The evidence at trial showed that the movant was the principal of Red Sea Management and Sentry Global Securities both of which were located in San Jose, Costa Rica. Red Sea specialized in offshore asset protection by providing incorporation, bank accounts, and brokerage accounts. (CR-DE 237 at 81; CR-DE 239, p. 10-11, 17-18, 21-22, 31-32, 41, 63; CR-DE 243, p. 33). Sentry Global specialized in trading securities. (CR-DE 234, p. 51; CR-DE 239, p. 9, 11, 33). Sentry was licensed by St. Kitts. (CR-DE 243, p. 61). The movant's standard practice was to "keep everything separated," with licensing, trading, and banking all occurring in different jurisdictions. (CR-DE 243, p. 61.) LPS&C Abogados, a law firm, also operated out of Red Sea's offices. (CR-DE 243, p. 51, 92). The purpose of law firm being located with Red Sea was to provide a "layer of protection." (CR-DE 243, p. 80). These entities were collectively referred to as "Red Sea" and facilitated stock manipulation schemes for its clients by using trading and bank accounts designed to avoid detection by regulatory authorities. (CR-DE 239, p. 42-46, 54-55, 62-63). Most of the stocks Red Sea traded were scams "that were not real." (CR-DE 243, p. 48.) The movant directed that accounts for Red Sea's clients be opened in the United States and Canada in the names of persons who were not the actual owners, nominees, in order to conceal the actual ownership of the accounts. (CR-DE 239, p. 36, 42, 45, 55, 62, 127; CR-DE 243, p. 70). The movant sometimes obtained nominee directors for Red Sea's clients from Professional Directors, Ltd. ("PDL"), a company in the United Kingdom. (CR-DE 239, p. 60-61, 177). David Ricci (who pled guilty conspiracy to commit securities fraud, wire fraud and mail fraud in case number 12-20049-CR-RWG), Sentry's head trader, and Ronny Salazar Morales ("Salazar")(who was a co-defendant in this case), who traded under Ricci, (CR-DE 239, p.

8, 10), had signature authority on many of Red Sea's nominee accounts. (CR-DE 239, p. 47, 56; CR-DE 243at 105-106). At the movant's direction, Joseph Francis, Jr. (who was charged separately), an assistant trader at Sentry, opened several nominee brokerage and bank accounts that were used to purchase and sell and manipulate stock for Red Sea and Sentry's clients. The movant directed Francis to make false representations in the account opening documents about his employment, income, net worth, and address. (CR-DE 239, p. 8, 42-49, 50-55, 59, 68, 72, 136, 204-205). In April 2006, Francis opened a brokerage account in the name of Twin Oaks Capital Management at Sterne, Agee & Leach, Inc., falsely representing his ownership of the account, his residence, his annual income, his net worth and that he was self-employed as a trading consultant. (CR-DE 239, p. 47-55, 97- 98, 177). In August 2006, the movant directed Francis to open a bank account in the name of Sentry at HSBC Bank in Vancouver, British Columbia. Francis did so, again presenting false representations. He claimed that he was the President and sole owner of Sentry and that the account would handle his personal trading proceeds. (CR-DE 239, p.119-126). In actuality, Red Sea used this account to receive and transfer proceeds from the sales of clients' stocks outside the United States. (CR-DE 239, p. 120, 123, 125; CR-DE 273, p. 60-62)

The movant directed the establishment of other nominee accounts. In October 2006, an account in the name of Market Maven Management was opened at American International Depository & Trust ("AIDT") in Denver, Colorado to hold client monies. (CR-DE 243, p. 81-84). The listed owner was Christopher Blythe. (CR-DE 243, p. 83-84, 90). Ricci was a signatory on the account, and Salazar was authorized to provide wire transfer instructions on behalf of Market Maven. (CR-DE 243, p. 83-84).

CO2 Tech was a United Kingdom-based company that purportedly manufactured and sold anti-global warming products and services to businesses, industries, and governments. The stock in CO2 Tech was controlled by co-defendants Eric Ariav Weinbaum and his partner, co-defendant Izhack Zigdon.(CR-DE 236, p. 63, 104, 194; CR-DE 237, p. 88; CR-DE 238, p. 69). In October 2006, Weinbaum met with the movant in Costa Rica to determine if he would do business with Red Sea and Sentry. (CR-DE 243, p. 110-111). After the meeting, the movant sent an email to Red Sea's Operations Manager advising that Weinbaum wanted "to move forward" and that his partner would provide the necessary paperwork. (CR-DE 273, p. 9-10). In January 2007, the movant and Weinbaum met again to discuss selling CO2 Tech stock through Red Sea. The movant repeatedly assured Weinbaum that money from sales of the stock could be wired out as directed. After receiving these assurances Weinbaum agreed to liquidate CO2 Tech stock through Red Sea and Sentry. (CR-DE 237, p. 73-82).

In order to facilitate the trading of CO2 Tech stock, Sentry opened a brokerage account in the name of JB Investments Enterprises Ltd. but did not list either Weinbaum nor Zigdon as an owner of record on the account. (CR-DE 239, p. 163; CR-DE 243, p. 112, 160; CR-DE 245, p. 160). On January 17, 2007, Red Sea was advised that 22.5 million shares of CO2 Tech stock would be deposited to Mission Management & Trust Co. in anticipation of the inception of trading. (CR-DE 243, p. 120-121). The JB Investments account at Sentry received the physical certificate for the stock on January 26, 2007. (CR-DE 243, p. 151).

Cooperating co-defendant Robert Weidenbaum was a stock promoter who operated CLX & Associates ("CLX") in Miami, Florida. (CR-DE 236, p. 58, 71). Weidenbaum and Weinbaum were friends and had executed several pump-and-dump schemes together. (CR-DE 236, p.

62, 66, 145; CR-DE 247, p. 62). Weidenbaum had created artificial volume and inflated the price of the securities so that Weinbaum could sell his stock into the marketplace at a profit. (CR-DE 236, p. 59, 62-63). In late 2006, Weinbaum approached Weidenbaum about manipulating the trading volume and share price of CO2 Tech stock by launching a media campaign and engaging others to make coordinated purchases of the stock. (CR-DE 236, p. 62-63, 65, 69). Weidenbaum contacted his business partner, co-defendant Timothy Barham, and co-defendant Ryan Reynolds about the CO2 Tech deal; the three of them had previously participated together in pump-and dump schemes. (CR-DE 236, p. 65-67, 98-99; CR-DE 238, p. 69). Weinbaum and Weidenbaum determined when trading would begin and agreed how much stock would be bought and sold and at what prices. (CR-DE 236, p. 205; CR-DE 237, p. 101).

Weinbaum hired CLX to create artificial demand for CO2 Tech stock, and Weidenbaum entered into a "consulting agreement" with CO2 Tech for "bringing awareness to the Company in the US marketplace." (CR-DE 236, p. 70-71). Weinbaum wired $275,000 to CLX to perform "investor relations" for CO2 Tech by disseminating positive news about the company to make certain that it was seen by investors.[1] (CR-DE 236, p. 72-74, 178). Weidenbaum testified that it was important that an investment relations firm promote a stock for manipulative trading because the investing public would not be interested in an unknown stock nor understand why the price was increasing. (CR-DE 237, p. 16). Weidenbaum hired several firms to redistribute the news on CO2 Tech. (CR-DE 236, p. 75-87).

On January 29, 2007, CO2 Tech began issuing press releases. The first release described CO2 Tech and how it recently had been

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[1]

formed. A second release gave additional details about the company and noted that its stock was available for purchase. (CR-DE 236, p. 101-104). The first two releases were crucial because "[y]ou don't want to be buying in a company that has put out no news or anything. It would raise suspicion with government regulators." (CR-DE 247, p. 65; CR-DE 238, p. 43, 92-93). On January 30, 2007, a third press release was issued entitled "CO2 Tech to Join Boeing's Global Environmental Efforts," claiming that CO2 "will join Boeing's global commitment to support anti-global warming activities and other environmental efforts," and that "Boeing's interest has been captured by CO2 Tech's new solution to reduce polluting gases emitted from airplanes at high altitudes," and that "CO2 Tech will proceed in the development of its innovative solution . . . so that Boeing may be the first aircraft manufacturer to implement the new anti-global warming system and successfully reduce air pollution from high-altitude emissions." (CR-DE 236, p. 106). In fact, CO2 Tech never had any relationship with Boeing. (CR-DE 245, p. 142-146).

Weinbaum sent his brother-in-law, Michael Bahar, to Costa Rica to oversee Salazar and Ricci, who would be trading CO2 Tech stock. (CR-DE 237, p. 47, 82-850). The movant met Bahar in Costa Rica and gave him a tour of Red Sea's offices. Bahar told the movant what computer and telephone equipment he needed in order to stay in constant touch with Weinbaum. (CR-DE 237, p. 89, 93-94). When trading began, Weinbaum conveyed sell orders to Bahar, who relayed them to Salazar and Ricci. According to testimony, an outsider like Bahar had never before been present in the trading room. (CR-DE 237, p. 97, 102; CR-DE 239, p. 75, 83; CR-DE 243, p. 116; CR-DE 245, p. 93). While CO2 Tech was trading, the movant stood over Salazar's shoulder and instructed him about which firms to use for the sales and purchases. (CR-DE 239, p. 80-82; CR-DE 243, p.

118-119, 131).

The stock of CO2 Tech had been dormant for months when Weinbaum and Zigdon began placing sell orders for shares of CO2 Tech stock through Red Sea on January 26, 2007. That first day they sold 17,000 shares. (CR-DE 243, p. 124, 151). The next trading day, January 29, 2007, Red Sea sold approximately 530,000 shares of CO2 Tech, the market closed at $0.90 per share. (CR-DE 237, p. 108, CR-DE 273, p. 34). On January 30, Red Sea sold more than 5 million shares of CO2 Tech stock, and the market closed at $1.65 per share—a price increase of more than 80 percent in one day. (CR-DE 237, p. 106 CR-DE 273, p. 34). That trading generated more than $5.5 million in proceeds for Weinbaum and Zigdon. (CR-DE 238, p. 7). Bahar left Costa Rica after a few days, although he continued to communicate with Salazar about CO2 Tech stock through instant messages. As Weinbaum and Zigdon continued to sell CO2 Tech stock through Sentry, trading volume declined considerably, as did the price of the stock. (CR-DE 237, p. 109, 113, 116; CR-DE 238, p. 7). By February 7, the average price per share had fallen to $0.44 cents, by February 26, the price per share was $0.20 cents. (CR-DE 238, p. 6-7). The price decreased further to $0.12 per share by the end of March 2007, and continued to fall. (CR-DE 243, p. 155-156; CR-DE 273, p. 30).

In all, the actions of the movant and codefendants resulted in proceeds of $7,375,943.48 from the sale of more than 8 million shares of CO2 Tech stock through Red Sea. (CR-DE 273, p. 57; see CR-DE 237, p. 119). These funds, commingled with funds from other stock sales, were wired from Red Sea controlled accounts and then to Sentry's HSBC account in Vancouver. (CR-DE 273, p. 58-60, 63). HSBC later wired more than $7 million in proceeds from sales of CO2 Tech stock to bank accounts around the world. (CR-DE 273, p. 58,

60-62). One wire to Panama for $71,253.00 went directly to the movant. (CR-DE 273, p. 67).

Several victims testified that they purchased shares of CO2 Tech stock at artificially inflated prices based on misrepresentations on CO2 Tech's website, faxes and emails. At the time they purchased the stocks they did not know that CO2 Tech's volume and price were manipulated. The investors either sold their shares at a tremendous loss or still owned the virtually worthless stock at the time of trial. (CR-DE 247, p. 138-156).

In closing, counsel argued the movant did not know that there was coordinated trading occurring or that the CO2 Tech press releases were false. (CR-DE 254, p. 78-85). Through cross-examination of government witnesses, the movant asserted that authorities from St. Kitts visited Red Sea twice a year. The evidence, however, was that the regulators never asked questions about trading or looked at trading records. (CR-DE 243, p. 63). The defense also asserted that Red Sea's compliance department approved new clients.[2] (CR-DE 239, p. 174-175; CR-DE 239, p. 87). However, the evidence showed few members of Red Sea's compliance committee knew anything about securities. (CR-DE 243, p. 65, 75-76). In cross examination, counsel also stressed that in November 2007, the movant had filed a Suspicious Activity Report with St. Kitts authorities concerning possible fraud in connection with CO2 Tech stock trading. (CR-DE 245, p. 116) Although such a report was filed it did not name either Weinbaum or Zigdon in connection with the fraud.

[2]The primary purpose of the committee was to make sure that prospective clients appeared to be legitimate. In the words of one witnesss, that meant, "you couldn't be an outright crim[inal]." (CR-DE 245, p. 109-110). And once a client was accepted, internal compliance concerning trading was "non-existent." CR-DE 243, p. 64; see CR-DE 243, p. 71 (Ricci: "they couldn't have had a clue").

The jury found the movant guilty as charged.

Prior to sentencing, a PSI was prepared which reveals as follows. The PSI set the movant's initial base offense level at 7, pursuant to USSG §3D1.2(a)-(c) and §2B1.1(a)(1). (PSI ¶¶57-58). Pursuant to USSG § 2B1.1(b)(1)(K), twenty levels were added because the loss was more than $7,000,000 but not more than $20,000,000. (PSI ¶59). Pursuant to USSG § 2B1.1(b)(2)(C), six levels were added because the offense involved 250 or more victims. (PSI ¶60). Pursuant to USSG § 2B1.1(b)(10)(B), (C), two levels included because a substantial part of the fraudulent scheme was committed from outside the United States. Pursuant to USSG § 3B1.1(b), three more levels were added because the movant was a manager of supervisor and the criminal activity involved five or more participants or was otherwise extensive. (PSI ¶63). The adjusted total offense level was 38. (PSI ¶68).

The probation officer next determined that the movant had three criminal history points, resulting in a criminal history category II. (PSI ¶70-71). The three criminal history points came from a conviction for conspiracy to commit securities fraud and commercial bribery entered in September 2011 in the Southern District of New York. (PSI ¶70). A total adjusted base offense level 38 and a criminal history category II, resulted in an advisory guideline range of 262 go 327 months in prison. (PSI ¶118). Statutorily, the movant faced up to 5 years in prison as to Count 1, up to 20 years for Counts 6, 8 and 10. (PSI ¶117).

The movant filed objections to the PSI. (CR-DE# 320). He objected generally to the facts provided in the PSI. He specifically objected to the calculation of the amount of loss by using the total amount of funds received from the sale of stock.

The movant next objected to the finding that there were more than 250 victims, arguing that the finding was based on totaling everyone who ever bought or sold the stock. He objected to a four level increase for acting as an investment advisor. Finally, he objected to the three level increase for being a manager or supervisor in an offense involving five or more participants, arguing that on two others were involved in the "pump and dump" scheme. The movant also argued for a variation from the guideline recommendation to avoid sentencing disparity from previously sentenced co-defendants. As a part of this argument, the movant argued the criminal history points assessed were based on a crime that occurred after the events giving rise to his prosecution in this district.

On May 11, 2012, the movant appeared for sentencing. (CR-DE#415). The movant, through counsel argued that the proper measure of the amount of loss was the amount lost by the "unsuspecting public" rather than the total proceeds from the sale of stock. The movant also argued that there was no evidence at trial of the number of victims. He contended that a co-defendant had been sentenced based on fewer that 250 victims. The government rebutted this argument by pointing out that over 1600 purchasers of the stock had been identified through "Blue Sheets." The movant argued he the base offense should not be increased for the manager supervisor role because there was only evidence of two other participants.

The court accepted the movant's written objection regarding the investment adviser enhancement and declined to include the four level increase. The trial court overruled the movant's objections to the amount of loss, number of victims and manager supervisor enhancement. After considering the statement of the parties, the

PSI, containing the advisory guidelines, and the statutory factors, the court sentenced the movant to a total of 240 months in prison which was to run concurrent with a sentence imposed in the Southern District of New York. The judgment of conviction was entered on the docket by the Clerk on May 14, 2012. (Cr-DE#362). The movant appealed.

On appeal the movant raised four issues for review. He argued:

1. The trial court erred in denying his motion to suppress.

2. The trial court erred in denying the motion to continue trial

3. Restitution was improperly imposed.

4. The admission of inadmissible evidence amounted to cumulative error.

On May 28, 2014 the Eleventh Circuit affirmed the conviction. United States v. Curshen, 567 Fed. Appx. 815 (11th Cir. 2014). The court found that the movant's claims "lack merit and warrant no further discussion except for the [evidentiary] claims." Id. at 816. As to the evidentiary claims the court found that even if the trial "court abused its discretion, such error was harmless because the trial record provides overwhelming evidence of defendants' fraud." Id. at 817.

The petitioner sought certiorari review in the Supreme Court. On January 15, 2015 the Court denied such review. (CR-DE# 480). The instant motion was filed on December 14, 2015, less than one year from the date certiorari review was denied.

Discussion of Claims

As will be demonstrated in more detail *infra*, the movant is

not entitled to vacatur on any of the claims presented. When viewing the evidence in this case in its entirety, the alleged errors raised in this collateral proceeding, neither individually nor cumulatively, infused the proceedings with unfairness as to deny the petitioner due process of law. The petitioner therefore is not entitled to habeas corpus relief. See Fuller v. Roe, 182 F.3d 699, 704 (9 Cir. 1999)(holding in federal habeas corpus proceeding that where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation), overruled on other grounds, Slack v. McDaniel, 529 U.S. 473, 482 (2000). See also United States v. Rivera, 900 F.2d 1462, 1470 (10 Cir. 1990)(stating that "a cumulative-error analysis aggregates only actual errors to determine their cumulative effect."). Contrary to the petitioner's apparent assertions, the result of the proceedings were not fundamentally unfair or unreliable. See Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

Here, the movant challenges counsel's effectiveness for multiple reasons. In order to prevail on a claim of ineffective assistance of counsel, the movant must establish: (1) deficient performance - that his counsel's representation fell below an objective standard of reasonableness; and (2) prejudice - but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000)(*en banc*). The standard is the same for claims of ineffective assistance on appeal. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). A court may decline to reach the performance prong of the standard if it is convinced that the prejudice prong cannot be satisfied. Id. at 697; Waters v. Thomas, 46 F.3d 1506, 1510 (11 Cir. 1995).

In the case of ineffective assistance during the punishment phase, prejudice is established if "there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993); United States v. Bartholomew, 974 F.2d 39, 42 (5th Cir. 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. The court need not address both prongs of the Strickland standard if the complainant has made an insufficient showing on one. Id. at 697. However, a movant must establish that the sentence was increased due to counsel's deficient performance. Glover v. United States, 531 U.S. 198, 203-204 (2001).

Moreover, review of counsel's conduct is to be highly deferential. Spaziano v. Singletary, 36 F.3d 1028, 1039 (11 Cir. 1994), and second-guessing of an attorney's performance is not permitted. White v. Singletary, 972 F.2d 1218, 1220 ("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); Atkins v. Singletary, 965 F.2d 952, 958 (11 Cir. 1992). Because a "wide range" of performance is constitutionally acceptable, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." Rogers v. Zant, 13 F.2d 384, 386 (11 Cir. 1994).

Finally, although the sentencing process may be reviewed by the district court on a §2255 motion, the severity of a sentence within statutory limits may not be reviewed because it raises no constitutional or statutory question. Kett v. United States, 722 F.2d 687, 690 (11th Cir. 1984); see also, Nelson v. United States, 709 F.2d 39, 40 (11th Cir. 1983)(citing, United States v. Diaz, 662

F.2d 713, 719 (11th Cir. 1981); United States v. Becker, 569 F.2d 951, 965 (5th Cir.), cert. denied, 439 U.S. 865 (1978), United States v. White, 524 F.2d 1249, 1254 (5th Cir. 1975), cert. denied, 426 U.S. 922 (1976).); See also Williams v. Alabama, 403 F.2d 1019, 1020 (5th Cir. 1968)(§2254 habeas case)(sentence within statutory limit is generally not subject to constitutional attack); Castle v. United States, 399 F.2d 642, 652 (5th Cir.1968) (§2255 case) (sentence within statutory limit is not reviewable on appeal and does not amount to a constitutional violation). These former Fifth Circuit decisions are controlling authority in this circuit. Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1209 (11th Cir.1981) *(en banc)*.

Sentencing Claims

Of the ten claims raised, all but two address alleged errors in the calculation of the sentencing guidelines. In his first three claims the movant presents issues addressing alleged errors in the computation of his sentence under the sentencing guidelines. In his sixth and seventh claims he argues that trial counsel failed to object to the guidelines calculations. In his final three claims he argues that appellate counsel was ineffective for failing to raise sentencing issues on appeal.

He first claims that the sentencing guidelines were wrong because the number of victims was incorrectly calculated. He next claims that the victim losses were incorrectly calculated. In his final challenge to the guidelines calculation he claims that his criminal history was incorrectly calculated because it included points for a conviction that constituted relevant conduct to the instant case. In related claims he contends that trial counsel was ineffective for failing to object to the criminal history calculation and failed to ensure that the relevant conduct

enhancement was based on the profit from the sale of stock rather than from the proceeds. Finally he claims that appellate counsel was ineffective for failing to appeal the enhancement for his role in the offense; the intended loss and number of victims, and the calculation of the criminal history. Since the sentencing claims and the ineffective assistance of counsel claims are related, they will be addressed together.

Calculation of the Number of Victims

The movant contends that the number of victims was substantially below 250. He argues that the government's claim that there were approximately 1600 victims was speculative and based solely upon the number of persons who had acquired shares over a thirty year period. He alleges that the government never verified if any of the parties owned stock at the time the offenses were committed. He also argues that appellate counsel was ineffective for failing to appeal this issue.

The trial court adopted the finding of the PSI that the number of victims was more than 250. The finding of 250 or more victims increased the movant's base offense by 6 levels. The PSI did not explicitly set forth how the number of victims was determined, although in the victim impact portion of the PSI the probation office noted that it had sent out notice to 1563 victims requesting information about their losses. In the addendum to the PSI the probation office addressed the movant's objections to the calculation of the number of victims. The probation office again noted it had sent letters to 1563 victims.

In its sentencing memorandum the government addressed the number of victims. It noted that four co-defendants had entered plea agreements admitting that there were 250 or more victims. (CR-

DE# 335). The government also noted that the trading records showed that approximately 1600 individuals had purchased shares of the stock. In support of its argument the government cited a prior order (CR-DE# 165) that had permitted notice by publication due to the large number of victims. The government argued that due to the number of shares involved it was clearly foreseeable that the number of victims would exceed 250.

At sentencing both parties reiterated their respective arguments. The court found that the government had established that the number of victims exceeded 250 and overruled the movant's objection.

The movant's challenge to the guidelines calculations has been procedurally defaulted because it was not raised on direct appeal. Ordinarily, a motion to vacate under §2255 is not a substitute for a direct appeal, and issues which could have been raised on direct appeal are generally not actionable in a section 2255 motion and will be considered procedurally barred. Massaro v. United States, 538 U.S. 500 (2003). See also United States v. Frady, 456 U.S. 152 (1982); Ayuso v. United States, 361 Fed.Appx. 988, 991-92 (11th Cir. 2010)(§2255 movant's claim that the calculation of his criminal points under the guidelines was no longer correct because one of his state convictions was vacated after he was sentenced did not constitute a constitutional error and did not "implicate [ ] a fundamental defect in the validity of the district court proceedings" so as to rise to the level of a "miscarriage of justice."); Hill v. United States, 317 Fed.Appx. 910, 913-14 (11th 2009); Lynn v. United States, 365 F.3d 1225, 1234-35 (11th Cir. 2004); Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989).

There is an exception, however, if movant can establish cause and prejudice to excuse the default of the claim, or if he can establish his actual innocence. Lynn, 365 F.3d at 1234 (*citing* Bousley v. United States, 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)); Nyhuis, 211 F.3d at 1343. To the extent movant attempts to excuse the procedural default by raising the related claim of ineffective assistance of counsel which is grounded in the Sixth Amendment, and thus cognizable under 28 U.S.C. §2255, the claim warrants no relief. See, e.g., Lynn v. United States, 365 F.3d 1225, 1234 n. 17 (11th Cir. 2004). The law is clear that a claim of ineffective assistance of counsel may constitute cause for failure to previously raise the issue. United States v. Breckenridge, 93 F.3d 132 (4 Cir. 1996). Attorney error, however, does not constitute cause for a procedural default unless it rises to the level of ineffective assistance of counsel under the test enunciated in Strickland v. Washington, 466 U.S. 668 (1984); Murray v. Carrier, 477 U.S. 478, 488 (1986). Here, movant cannot succeed on these claims because he cannot satisfy the Strickland test, so that the claims which could have been, but were not raised on direct appeal, are barred from review in this collateral proceeding. Nevertheless, the claims are addressed briefly because they also fails on the merits.

Trial counsel was not ineffective for failing to challenge the number of victims set forth in the PSI. Counsel did in fact object to the number of victims. At sentencing the movant challenged the number of victims in his objections to the PSI and at the sentencing hearing. Counsel argued that he could not determine how the probation officer reached the figure of 250. He claimed that the figure included everyone who ever bought or sold CO2 Tech stock regardless of whether they actually lost money or were part of the scheme. The government countered that the number of victims was

based on the trading reports indicating that approximately 1600 individuals had made trades in CO2 stock during the scheme. All of those individuals had been notified by mail and the government had also provided published notice to account for any additional victims they could not identify from trading records.

Although counsel presented argument on the issue he was unsuccessful. Since trial counsel did in fact challenge the number of victims, the petitioner cannot meet the first prong of the Strickland test for ineffective assistance of counsel and this claim should be denied. Further, as discussed below, the enhancement for the number of victims was properly calculated, therefore the movant was not prejudiced.

Appellate counsel was not ineffective for failing to raise this issue on direct appeal. The movant argues that counsel should have argued that the number of victims should be based on the number of responses the government received from the more than 1600 victim letters it sent out. He claims that the government's number was unsupported by evidence. However, as reflected in the transcript of the sentencing hearing the government supported its calculation of the number of victims through use of "Blue Sheets," or trading data, indicating that approximately 1600 individuals had purchased shares of CO2 during the scheme. Thus the argument that the victim number was not supported would have been without merit.

The movant's argument that the number of victims should have been based on the number of responses is also meritless. In United States v. Foley, the court held it was error to determine the number of victims from the responses received by the probation office. 508 F.3d 627, 633 (11th Cir. 2007). Since the argument

proffered by the movant is lacking in merit he cannot establish that counsel was ineffective for failing to pursue such argument. See Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001); United States v. Sanders, 165 F.3d 248, 253 (3rd Cir. 1999).

Calculation of Victim Losses

The movant next claims that the trial court erroneously accepted the PSI finding that the victim losses were $7.3 million. He contends that the actual amount of victim losses was only $808,372.32 for the 99 victims who responded to the government's letters. He argues that these were the only victims during the time frame when he was a party to the conspiracy. He has also argued that trial counsel was ineffective for allowing him to be sentenced for the total amount of proceeds rather than the profits and that appellate counsel was ineffective for failing to appeal this issue.

The trial court accepted the PSI finding that the losses were more than $7 million but less than $20 million. The PSI did not provide an explanation for the amount of loss. The movant objected arguing that the amount of loss should not include sale of stock to co-conspirators. In the addendum to the PSI the objection to the amount of loss was addressed. The probation officer noted that the amount of loss was calculated as the greater of the actual or intended loss and that it includes any harm that would be impossible or unlikely to occur. The probation officer included the sale to co-conspirators because that sale was part of the "pump and dump" scheme and was needed to perpetrate the fraud.

At sentencing movant's counsel argued that the sale of stock to co-conspirators should not be included, but conceded that the loss was more than $2.5 million. The government argued that the evidence at trial had proven that the shares to co-conspirators

were intended to ultimately be sold to unsuspecting investors as part of the "pump and dump" scheme. The government argued that the actual intended loss would have been much higher than $7 million but for the fact that the scheme fell apart. The trial court found the amount of loss exceeded $7 million.

As with his first sentencing claim, this claim is procedurally barred. The movant cannot avoid the procedural bar because counsel was not ineffective in challenging the amount of loss.

Trial counsel did object to the amount of loss. In his objections to the PSI he challenged the calculation of the amount of loss by arguing that a large number of the shares of stock were sold to co-conspirators as part of the plan to inflate the price of the stock. He contended that in measuring loss to investors the proceeds of sales to co-conspirators should not be included. He claimed that if even a small percentage of those sales were deducted from the $7.3 million loss calculation the total would be below the $7 million threshold that triggered the 20 level increase in the offense level. The government countered that the $7.3 million figure represented the proceeds from the sale of CO2 Tech stock and was supported by the evidence presented at trial.

The calculation of the amount of loss under the guidelines provides for a 20 level increase if the amount of loss exceeds $7 million but is less than $20 million. See USSG §2B1.1(b)(1)(K). The amount of loss is the greater of the actual loss or the intended loss. See USSG §2B1.1, comment, (n.3). Actual loss is defined as the reasonably foreseeable pecuniary harm while intended loss is defined as the pecuniary harm that was intended to result and includes intended pecuniary harm that would have been impossible or unlikely to occur. See id. The court shall use the gain that

resulted as an alternative measure of loss only if there is a loss but it reasonably cannot be determined. See id. The court need only make a reasonable estimate of the loss.

In the instant case the amount of loss was based upon the amount of pecuniary gain to the co-conspirators. The $7.3 million figure was based on evidence presented at trial establishing the proceeds received by the co-conspirators. This amount was properly established under the guidelines as it represented the actual loss, or alternatively the gain that resulted from the offense where the reasonably foreseeable loss would be difficult to determine. The amount was, as required, a reasonable estimate of the loss. Since the amount was properly established the movant cannot establish that he was prejudiced either by trial counsel's failure to prevail on this claim or on appellate counsel's failure to raise this claim on appeal. This claim should be denied.

The movant also raises a related claim that trial counsel was ineffective for failing to argue that the amount of loss should have been determined based upon the amount of profits rather than the proceeds. The movant incorrectly relies upon the amount of proceeds for which he was found responsible for laundering rather than the loss amount that was due to fraud. As pointed out by the government in its response, the movant has misconstrued United States v. Santos. 553 U.S. 507 (2008) to support his argument.

As reflected in the PSI, the two mail fraud counts resulted in the highest offense level. (PSI ¶57). The amount of loss was calculated based on these charges which resulted in the $7.3 million loss amount. In Santos the Court was considering whether a money laundering conviction could be based on the proceeds of illegal activity rather than on the profits. Santos at 509. The

Court found that a money laundering conviction could not be based upon the mere proceeds but rather only upon the profits. The Court did not address the calculation of the loss amount in the Sentencing Guidelines. Since Santos is inapplicable, counsel could not have been ineffective for failing to raise the meritless claim.

Calculation of Criminal History

In his final challenge to his sentence, the movant contends that his criminal history was calculated improperly. He argues that his conviction in the Southern District of New York involved crimes that covered the same approximate time period as those in the instant case. He alleges that both cases were connected to common factors and that the New York case should not have used to assess criminal history points. The movant has also argued that trial counsel was ineffective for failing to raise this claim at sentencing.

The movant, through counsel, did not contest the criminal history as set forth in the PSI. Counsel argued that the court should consider the fact that the New York conviction was for an offense that occurred after the events in the instant case. He contended that the inclusion of this offense unfairly overstated the movant's criminal history because he "it was merely a matter of luck" that the New York conviction preceded the instant conviction. This issue was not raised at the sentencing hearing.

The movant's sentencing claim is procedurally barred. As discussed, *infra*, he cannot establish cause or prejudice because counsel was not ineffective for failing to raise this issue.

The movant argues that the New York conviction should not have been counted in his criminal history because it involved the same

type of conduct that occurred during the same period of time as the offense that is the subject of the instant case. He argues that because the New York conviction involved a similar "pump and dump" scheme that occurred during the same time frame it qualified as relevant conduct under the guidelines.

The movant's argument is unavailing. Under the guidelines "[t]he term 'prior sentence' means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense." USSG § 4A1.2(a). "Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3." USSG §4A1.2, comment, (n.1).

The movant's New York conviction, which also involved a "pump and dump" scheme, may have involved similar conduct, but did not involve conduct that was relevant to the instant offense. The New York conviction involved a scheme to "pump and dump" stock in a different company and the bribery of a stock broker. The movant was convicted of conspiracy to commit securities fraud and commercial bribery. (PSI ¶70). Other than the movant, there were no common defendants in the New York case. The conduct of the instant case regarding the sale of stock in CO2 Tech had been completed by late March 2007 when its market price dropped to $.01. (PSI ¶42). Whereas, the events in the New York case did not begin until October 2007. (PSI ¶70). In short, the two cases involved different conduct which did not occur at the same time. The only commonality between the two cases was the fact that both involved "pump and dump" schemes, albeit with regards to different stocks. Since the two crimes were not relevant to each other, counsel was not ineffective for failing to raise this non-meritorious issue.

Calculation of Role in the Offense Enhancement

Although not raised as a challenge to the sentencing procedures, the movant nevertheless challenges the inclusion of an enhancement as a manager or supervisor where the criminal activity involved five or more participants. He argues that he was not a manager of people, but merely managed a business that was used in the offense. He claims that if appellate counsel had raised this claim on appeal he would have received a less severe sentence.

The movant through counsel contested the enhancement as a manager or supervisor in his objections to the PSI. He argued that he only supervised two persons who participated in the scheme. He claimed that the other persons involved were not under the movant's control or supervision. As such he contended that he could not be deemed to have supervised five or more participants and should not receive the three level increase.

The movant reiterated this argument at sentencing. The government responded that the evidence at trial had established there were at least five participants in the scheme. The trial court found that the basis for the enhancement had been established.

A three level increase in the offense level applies"[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive[.]" USSG § 3B1.1(b). In order to qualify for the enhancement the defendant "must have been the . . . manager, or supervisor of one or more other participants." USSG § 3B1.1, comment., (n.2). The evidence at trial established that the movant, as the manager of Red Sea, was the manager of Francis and Ricci, two of the brokers involved in the

scheme. Additionally, the movant's claim is belied by arguments made in his motion. He acknowledges that he directed Ricci to move all of the CO2 Tech cash and securities to an account in Germany. (CV-DE# 12, p. 37). His claim that he merely managed the property where Red Sea was located is refuted by the evidence. Any attempt by counsel to raise this claim on appeal would have been unavailing. This claim should be denied as counsel cannot be ineffective for failing to raise a meritless issue.

Ineffective Assistance of Trial Counsel Claims

The movant also raises two additional claims of ineffective assistance of counsel. He first claims that counsel failed to share discovery, discuss the case or investigate the case. In a related claim he argues that counsel failed to interview and use potential defense witnesses provided by the movant.

Failure to Share Discovery and Discuss Case

The movant contends that counsel was ineffective for failing to timely share discovery which prevented him from participating in his defense. He also claims that counsel failed to communicate with him to discuss discovery strategy and defenses to the charges.

The arguments presented by the movant are speculative at best. He contends that if counsel had provided him with more discovery regarding two other "pump and dump" schemes he was involved in he could have used it to fashion a defense. His defense being that he knew those other stocks were scams and made money for his Red Sea clients while the CO2 Tech scheme did not. Based on the movant's logic this meant that if he had known that the CO2 Tech stock was a scam Red Sea clients would have made money. In support he contends that it was other co-defendants who engaged in the fraudulent promotion of CO2 Tech, and that he had no involvement in

the fraud. This argument completely ignores the testimony at trial which established that the movant set up CO2 Tech with the means to perpetrate the fraud through Red Sea. It also fails to account for the testimony that the movant was present during trading and was looking over the shoulder of one of his traders as the scheme was unfolding. As was noted by the Eleventh Circuit in its opinion affirming the movant's conviction, "the trial record provides overwhelming evidence of the defendants' fraud. United States v. Curshen, 567 Fed.Appx. 815, 817 (11th Cir. 2014). The movant has failed to establish that any failure on counsel's part to provide additional discovery or further discuss the case affected the outcome at trial. The failure to establish a reasonable probability of a different outcome is fatal to his claim that counsel performance prejudiced him. This claim should be denied.

Failure to Locate and Interview Witnesses

In his next claim, the movant argues that counsel was ineffective for failing to interview certain witnesses. The movant contends that he provided counsel with the names of who worked at Red Sea or Sentry and would testify regarding what occurred during the trading of CO2 Tech. According to the movant, this testimony would have provided the jury with more information about the operations of Red Sea. He claims that if the jury had received this information the outcome of the trial would have been different.

In the instant case the movant first alleges that counsel failed to contact the witnesses. However, the motion and attachments to a certain extent refute this claim. The movant acknowledges that counsel retained an investigator to locate a number of the witnesses. The investigator contacted several of the witnesses and conducted interviews. The summaries of the interviews were presented to counsel. The investigator spoke to Merly Barrios,

Mauricio Robles, Joseline Masis, Mark Wells and Paulo Samuels. Thus the claim that counsel did not investigate these witnesses is clearly refuted. Review of the investigator notes shows that there is no reasonable probability that their testimony, even assuming it was admissible, would have resulted in a different outcome at trial.

The movant claims that his wife Merly Barrios would have testified regarding a conversation between himself and Weinbaum that dealt with the stock even though she was not a party to the conversation. He proffers that she would have testified that the movant told her the CO2 Tech stock was legitimate. The movant does not explain how this testimony would have been admitted over a hearsay objection. The proffered testimony, that he told his wife what he had discussed with Weinbaum, is clearly hearsay within hearsay for which there is no exception. Thus this testimony could not have altered the outcome at trial.

The movant claims that Mark Wells, the IT manager for Red Sea and Sentry, had information on all e-mails sent and received and information on all business conducted on any computer within either company. The movant provides no argument as to how this information would have affected the trial. Since there is no showing how this testimony would have altered the trial outcome, the movant was not prejudiced by counsel's failure to call Wells.

The movant claims that Mauricio Robles would have testified that he worked for David Ricci as his assistant. Robles supposedly knew everything that Ricci did. Ricci was a co-defendant and witness for the government. He testified at trial. The movant has not proffered any testimony from Robles that would be either impeaching of Ricci or otherwise exculpatory. Again there is no

showing of prejudice because there is no showing that this testimony would have altered the outcome at trial.

The petitioner claims that Joseline Masis would have testified that she took orders from Ricci and Salazar. Masis also would have testified that the movant could not have known what Ricci and Salazar were doing on the trading floor because he was "always traveling." The movant ignores her statement to the investigator that she did not know Bahar. This statement puts her statement that she would know what was happening on the trading floor in question since the evidence at trial established that Bahar was present on the trading floor during the trading of CO2 Tech stock. The movant also ignores the testimony of two witnesses that he was present during the trading of CO2 Tech stock, standing directly behind traders as the trading activity was recorded. The movant's claim also ignores a statement made by Robles that the movant would come by the trading floor once a day when he was in the office. Once again, the proffered testimony does not establish prejudice because there has been no showing of a reasonable probability that the outcome at trial would have been different.

The movant does not proffer what testimony Paulo Samuels would have presented, he merely alleges that he was contacted to late to attend trial. Review of the investigator notes does not show any testimony that would have affected the outcome at trial. The investigator notes show that Samuels began working at the company in May 2008. The scheme had for the most part concluded prior to that date, thus any testimony presented through Samuels would not have been relevant to the movant's conduct during the time when the pump and dump scheme was being perpetrated. Assuming Samuels had testified, there is no reasonable probability that the outcome would have been different.

The movant also mentions other witnesses who were not contacted by counsel. He claims that John Henry Schile was an attorney who was retained to respond to subpoenas issued by the Securities and Exchange Commission ("SEC"). He claims Schile would have testified that Sentry fully complied with the SEC's investigation and provided all requested information. This proffered testimony addresses events that occurred after the events that constituted the crimes in the instant case. The proffered testimony is neither exculpatory or impeaching of other witnesses and therefore would not have altered the outcome of the trial.

The movant proffers that Bruce Rubin, a part of Red Sea and Sentry's compliance committee, would have testified to the extensive due diligence to which all potential clients were subjected. He would have testified that "it was the Petitioner's belief that Ariav Weinbaum and Izhack Zigdon were legitimate business people who had promised Petitioner they were going to conduct a lots [sic] of business with SGS." While the testimony of the actions of the compliance committee might have been helpful, the compliance actions of the company were addressed at trial through the testimony of Ricci. His testimony on this issue was explored on cross examination. Thus such testimony would have been of limited beneficial value, especially in light of the extensive evidence that CO2 Tech was not a legitimate business. Additionally, any testimony by Rubin about the movant's "belief" that Weinbaum and Zigdon were legitimate businessmen would not have been inadmissible as hearsay. There is no reasonable probability that the proffered testimony of Rubin would have led to a different result at trial.

According to the movant, Michael Herman Hoffman would have testified on concentrated security positions in clients' accounts

at Red Sea and Sentry. He would have told the jury that the deposit of CO2 Tech securities in the JB Investment accounts did not require any disclosure statements to the SEC. The movant has not shown that this evidence was relevant or admissible. The question of whether an SEC disclosure was required is not relevant to the pump and dump scheme and other charges for which the movant was convicted. There has been no showing that such testimony, even if admitted, would have resulted in a different outcome.

Finally, the movant proffers the testimony of Michael Skillern. The movant states that Skillern was present at the meeting with Weinbaum. According to the movant, Skillern would have testified to the agreement that was reached for Sentry to sell a legitimate stock. He would have also testified that Bahar was allowed to trade stock at Sentry in order to curry favor with Weinbaum so that he would do more business in the future. Skillern also would have testified that he had allowed Sentry to trade shares in his own company, QBIT, which was not a pump and dump scheme. The testimony of Skillern regarding what was discussed, and the agreement that was made, would have been inadmissible hearsay. Skillern was not involved as an employee or owner of either Red Sea or Sentry. Any knowledge he would have about the agreement would have been based on out of court discussions at which he was present. The movant cannot show that this testimony would have been admissible over objection. The testimony regarding QBIT was not relevant. The fact that Sentry may have traded in the other company had no bearing on whether CO2 Tech was a legitimate company. The fact that CO2 Tech was a scam was supported by more that sufficient evidence. Any testimony about other supposedly legitimate companies, even assuming it was admissible, would not reasonably have altered the jury's determination on the issue.

As discussed above, the movant has not established that counsel was ineffective. The decision of what witnesses to call is a strategic decision which a court "seldom, if ever, second guess." Allen v. Secretary, 611 F.3d 740, 759 (11th Cir. 2010). As reflected by the movant's arguments it can only be assumed that he informed counsel of each of these witnesses and their purported testimony. Since none of the proposed witnesses testimony would have a reasonable probability of altering the trial outcome, counsel's strategic decision to not call these witnesses cannot be considered deficient performance. Furthermore, since the witnesses would not have altered the outcome at trial the movant was not prejudiced by counsel's failure to call these witnesses. The movant's claim that counsel was ineffective for failing to interview and call these witnesses should be denied for failing to establish either prong of the Strickland test.

The movant's request for an evidentiary hearing on his claims of ineffective assistance of counsel should be denied. A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations or affirmatively contradicted by the record. See Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989), citing, Guerra v. United States, 588 F.2d 519, 520-21 (5th Cir. 1979). As previously discussed in this Report, the claims raised are unsupported by the record or without merit. Consequently, no evidentiary hearing is required.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Cases in the United States District Courts provides: "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." If a certificate is issued, "the

court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Rules Governing Section 2255 Cases.

The petitioner in this case fails to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 1603-04, 146 L.Ed.2d 542 (2000) (explaining the meaning of this term) (citation omitted). Therefore, it is recommended that the Court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Rule 11(a), Rules Governing Section 2254 Cases. If there is an objection to this recommendation by either party, that party may bring such argument to the attention of the district judge in the objections permitted to this report and recommendation.

Conclusion

It is therefore recommended that this motion to vacate sentence be denied and the case closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 11th day of April, 2011.

UNITED STATES MAGISTRATE JUDGE

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