IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12836-E

ALAN RENE SAJOUS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Alan Rene Sajous moves for a certificate of appealability ("COA"), as construed from his notice of appeal, in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate. To merit a COA, he must show that reasonable jurists would find the merits of an underlying claim debatable. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Sajous has failed to satisfy the *Slack* test for his claims, his motion for a COA is DENIED.

His motion for *in forma pauperis* status is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-20034-CIV-LENARD/REID

ALAN RENE SAJOUS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING AND SUPPLEMENTING REPORT OF THE MAGISTRATE JUDGE (D.E. 57), DENYING MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE (D.E. 1), DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on the Report of Magistrate Judge Lisette Reid issued on May 8, 2019, ("Report," D.E. 57), recommending that the Court deny Movant Alan Rene Sajous's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, ("Motion," D.E. 1). On May 20, 2019, Movant filed Objections to the Report. ("Objections," D.E. 58.) Upon review of the Report, Objections, and the record, the Court finds as follows.

I. Background

Because Movant does not object to Judge Reid's recitation of the relevant factual and procedural background, the Court repeats it here for consistency:

A. Indictment

> On December 1, 2014, the movant was charged by Information with knowingly possessing 15 or more unauthorized access devices with intent to

defraud, in violation of 18 U.S.C. §§ 1029(a)(3) and 2. (Cr-DE#19). Movant waived his right to prosecution by indictment, and entered a not guilty plea. (Cr-DE#s21,22).

B. Plea Agreement and Stipulated Facts

After initially denying guilt, the movant pled guilty to the Information, pursuant to the terms of a negotiated written plea agreement. (Cr-DE#40). The government agreed to recommend up to a three-level reduction to the movant's applicable base offense level, under the guidelines, based on movant's timely acceptance of responsibility. (Id.:3).

The movant understood that the court was not bound by and could depart from the advisory guideline range determined under the Federal Sentencing Guidelines. (Id.:1-2). Movant agreed that the court could tailor the ultimate sentence imposed by considering other factors and could impose any sentence within and up to the statutory maximum authorized by law for the offense of conviction, which he understood to be a term of ten years' imprisonment followed by up to three years' supervised release. (Id.:1-2). In addition, movant agreed that the court could impose a fine of $250,000.00 and a $100.00 special assessment. (Id.:2). Movant was aware that any estimate of the probable sentencing range or sentence, whether from defense counsel, the government, or probation officer, was a prediction and not a promise, and was not binding on the court. (Id.:6). The movant understood that the government, in its discretion, could file a motion for reduction of sentence, should he provide substantial assistance to the prosecution in its investigation of other criminal matters. (Id.:4). Finally, movant understood that he could only appeal his sentence if it exceeded the statutory maximum or was the result of an upward departure or variance. (Id.:5).

On March 10, 2015, the movant executed a stipulated factual proffer, agreeing to the following facts.

> In connection with an investigation, law enforcement obtained a search warrant to search a home in North Miami, Florida. The Florida Drivers and Vehicle Identification Database (DAVID) indicated that the Defendant lived at this same address. On June 11, 2014, law enforcement executed the search warrant. Inside the premises was an office. This office contained, among other things, notepads with personally identifiable information ("PII") (including the social security numbers of more than fifteen individuals), and pre-paid debit cards with account numbers. The PII was exposed in plain sight.

> In the office, law enforcement found a business plan for a business owned by the Defendant. Also in the room were business cards for "Laguerre Enterprises" with the Defendant's name written on the back. According to the Florida Department of Corporations, the Defendant is the CEO of Laguerre Enterprise LLC. The Defendant's fingerprints were found on various papers throughout the office.
>
> Given the foregoing facts, had this case proceeded to trial the United States would have proven the following facts beyond a reasonable doubt: (1) the Defendant knowingly possessed at least fifteen unauthorized access devices at the same time; (2) the Defendant knew that the devices were unauthorized; (3) the Defendant acted with the intent to defraud; and (4) the Defendant's conduct in some way affected commerce between one state and other states, or between a state of the United States and a foreign country.

(Cr-DE#41).

On March 10, 2015, a change of plea proceeding was conducted in accordance with Fed. R. Crim. P. 11. (Cr-DE#59). . . .

[T]he court asked the government to proffer the facts that would have been proven if the case had gone to trial. (Id.:7-8). The government then read the stipulated factual proffer into the record. (Id.). Movant admitted the facts as stated by the prosecutor, and acknowledged that he signed the factual proffer after discussing it with his attorney. (Id.:8-9). Movant further stated that he had no corrections to the factual proffer. (Id.:9).

When asked how he wished to plead to the Information, movant responded, "Guilty, your Honor." (Id.:9). Movant acknowledged that the maximum possible penalty was ten years' imprisonment, to be followed by a three-year term of supervised release. (Id.:9-10). Movant also understood that the maximum possible fine was $250,000. (Id.:10). He acknowledged discussing with his attorney how the sentencing guidelines might apply in his case, and understood that the Court could impose a sentence up to the statutory maximum. (Id.:11-12).

Aside from the terms and conditions set forth in the agreement, movant denied that the government had made any other promises to induce him to change his plea. (Id.:13). Movant also denied being forced to plead guilty and admitted that he was pleading guilty of his own free will. (Id.:12-13). He indicated that he was satisfied with his attorney, having had adequate time to fully confer with him regarding the charges. (Id.).

Regarding the contents of the plea agreement, Movant agreed he was pleading guilty to the Information, charging him with possession of 15 or more unauthorized access devices. (Id.:13-14). Movant affirmed that he understood the terms and conditions set forth in the agreement and acknowledged that he had fully discussed the terms with his attorney before signing it. (Id.:20-21).

The Court then found the movant fully competent and capable of entering an informed plea, that the movant was aware of the nature of the charge and the consequences of the plea, and that his guilty plea was knowing and voluntary, supported by an independent basis in fact, containing each of the essential elements of the offense. (Id.:23). As a result, the court accepted the movant's plea and adjudicated him guilty as charged in the Information. (Id.).

C. Pre-Sentence Investigation Report and Sentencing Hearing

Prior to sentencing, a PSI was prepared which computed Movant's base offense level at a level 6, pursuant to U.S.S.G. § 2B1.1(a)(2). (PSI ¶22). The Movant's base offense level was then increased by 16 levels because the movant was accountable for a $1,151,482 loss amount, pursuant to U.S.S.G. § 2B1.1(b)(1)(I). (PSI ¶23). The PSI also found Movant accountable for 250 or more victims, which increased his offense level by six levels pursuant to U.S.S.G. § 2B1.1(b)(2)(C). (PSI ¶24). The movant's base offense level was then further increased by 2 levels because the offense involved the possession of device-making equipment pursuant to U.S.S.G. §§ 2B1.1(b)(11)(A)(i)(ii) and (C)(i). (PSI ¶25). This ultimately resulted in a total offense level of 30 (PSI ¶32). Notably, the PSI did not recommend the three-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1 that the parties had agreed to. (PSI ¶31). Based on the movant's criminal record, the PSI placed him in Criminal History Category III (PSI ¶42). This resulted in a guideline sentencing range of 121 to 151 months' imprisonment. (PSI ¶74). Statutorily, however, the movant's maximum possible term of imprisonment was capped at 120 months. (PSI ¶73).

The movant filed objections to the PSI. (Cr-DE#47). Specifically, the movant objected to the PSI's failure to include a recommendation for a reduction for acceptance of responsibility. (Id.). The movant also made a motion, which was joined by the United States, for a downward variance based on pending amendments to the United States Sentencing Guidelines that were set to come into effect, absent Congressional action, on November 1, 2015. (Id.). These amendments, if applied prospectively, would have

resulted in a two-level decrease in the level assigned for loss amount and a four-level decrease in the level for number of victims. (Id.). If the movant's objections were sustained at sentencing, his guideline sentencing range would have been 46 to 57 months' imprisonment. (*Id.*)

On June 1, 2015, the Court proceeded with sentencing. (Cr-DE#56). The movant acknowledged having reviewed the PSI with his attorney. (Id.:6). Ultimately, the Court sustained the counsel's objection to the PSI's failure to afford the movant an acceptance of responsibility adjustment, thereby reducing the advisory guideline imprisonment range to 87 to 108 months. (Id.:14-15,19). However, the Court denied the parties' joint motion for a downward variance in anticipation of proposed amendments to the sentencing guidelines. (Id.:33).

Next, counsel asked the court, based on the movant's life circumstances, to vary downward, and sentence movant to 46 months' imprisonment. (Id.:43-45). The government also acknowledged that it would be filing a Rule 35 motion to reduce movant's sentence based on his substantial assistance to the prosecution, and stated that the movant would be continuing to cooperate with the government after the imposition of the sentence. (Id.:46-47). The Court indicated it had considered the parties' arguments, together with the nature and circumstances of the offense and the history and characteristics of the defendant. (Id.:48-49). Thereafter, the court sentenced movant to a term of 108 months imprisonment, to be followed by a three-year term of supervised release. (Id.:56-57). The written judgment of conviction was entered on the docket on June 4, 2015. (Cr-DE#49).

Shortly thereafter, on June 9, 2015, the government filed a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35(b). (Cr-DE#50). In the motion, the government moved for a fifty percent reduction to movant's sentence based on his substantial assistance to the prosecution. (Id.). The Court then held a hearing on the motion and reduced the movant's sentence to 65 months' imprisonment. (Cr-DE#55).

On January 28, 2016, movant filed a motion to vacate pursuant to 28 U.S.C. § 2255. (Cr-DE#60). In that motion, movant raised multiple arguments, including a claim that his attorney was ineffective for failing to timely file a notice of appeal. (Id.:15). The motion was referred to United States Magistrate Judge Patrick White, who held a hearing on the claim on June 21, 2016. (See 16-CV-20455-Lenard: DE#29). The Court then issued a report, recommending that the motion to vacate be granted on the basis that movant's attorney was, in fact, ineffective for failing to file a timely appeal.

(Id.:DE#40). The District Court entered an order adopting the report and recommendation. (Id.:DE#71). Thereafter, the Court vacated the original judgment, re-imposed the original 108-month sentence, and permitted the movant to file a notice of appeal, pursuant to the procedure outlined in United States v. Phillips, 225 F.3d 1198, 1201 (11th Cir. 2000). (Cr-DE#87:9-10). The Court also acknowledged movant's previous sentence reduction to 65 months, and granted a second Rule 35 motion, further reducing movant's sentence to 52 months' imprisonment. (Id.:40; see also Cr-DE#80). The amended judgment was entered on the docket on January 31, 2017. (Cr-DE#84).

Movant timely filed a notice of appeal. (Cr-DE#81). In his appeal, he argued the following: (1) the information to which he pled guilty was invalid because it charged the wrong statute; (2) the government breached the plea agreement by failing to recommend at sentencing that he receive a low end of the guideline sentence; (3) the government erred by failing to introduce favorable evidence; and (4) the sentence was procedurally unreasonable. See United States v. Sajous, 704 F. App'x 823 (11th Cir. 2017). On August 21, 2017, the Eleventh Circuit Court of Appeals rejected movant's arguments and affirmed his conviction and sentence. Id. Shortly thereafter, on December 29, 2017, the movant filed the instant motion to vacate pursuant to 28 U.S.C. § 2255. (Cv-DE#1).

(Report at 4-12.) In his Motion, Movant asserts the following fifteen claims for habeas relief:

1. He was denied effective assistance of counsel when his lawyer allowed him to plead guilty to the wrong charging statute. (Cv-DE#1:5).

2. He was denied effective assistance of counsel when his lawyer allowed the government to breach the plea agreement. (Cv-DE#1:6).

3. He was denied effective assistance of counsel when his lawyer withheld verified third party perpetrator exculpatory evidence from the Court. (Cv-DE#1:8).

4. He was denied effective assistance of counsel when false information was used and relied upon to impose sentence. (Cv-DE#1:10).

5. He was denied effective assistance of counsel when his lawyer failed to realize that his sentence was beyond the statutory maximum for the offense. (Cv-DE#1:11).

6. He was denied effective assistance of counsel when his lawyer failed to request a sentence adjustment for time previously served in jail. (Cv-DE#1:12).

7. He was denied effective assistance of counsel when his lawyer failed to request a mitigating role reduction. (Cv-DE#1:13).

8. He was denied effective assistance of counsel when his lawyer agreed to a restitution order without his consent. (Cv-DE#1:14).

9. He was denied effective assistance of counsel when his lawyer failed to object to the loss amount. (Cv-DE#1:15).

10. He was denied effective assistance of counsel when his lawyer failed to request a downward departure based upon the "economic reality principle." (Cv-DE#1:16).

11. He was denied effective assistance of counsel when his lawyer failed to object to the Court's improper consideration of the 18 U.S.C. § 3553(a) factors at the Rule 35 hearing. (Cv-DE#1:17).

12. He was denied effective assistance of counsel when his lawyer failed to object to the Court's failure to recognize pertinent policy statements. (Cv-DE#1:18).

13. He was denied effective assistance of counsel when his lawyer failed to seek recusal of the judge. (Cv-DE#1:19).

14. He was denied effective assistance of counsel when his lawyer failed to object to the Court's failure to measure intent. (Cv-DE#1:20).

15. The trial court erred by not protecting his right of allocution. (Cv-DE#1:21).

(Report at 2-3.)

On October 18, 2018, while the instant 2255 Motion was still pending, Movant filed a Motion to Terminate Supervised Release. (D.E. 50.) Therein, Movant asserts that he

was "serving over 36 months in excess of the time that he was legally suppose to be exposed to. The only way to ameliorate for this travesty of justice . . . is to terminate his 36 months of supervised release . . . ." (Id.)

On January 18, 2019, Movant was released from prison and began serving his term of supervised release. (Report at 44.)

On May 8, 2019, Judge Reid issued her Report recommending that the Court deny the Motion on the merits, and because "movant's sentence was not issued in error and his constitutional rights were not violated during the proceedings . . . his motion to terminate supervised release should be denied." (Id.)

On May 20, 2019, Movant filed Objections.

II. Legal Standards

Upon receipt of the Magistrate Judge's Report and Petitioner's Objections, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); accord Fed. R. Civ. P. 72(b)(3). The court must conduct a de novo review of any part of the Report that has been "properly objected to." Fed. R. Civ. P. 72(b)(3); see 28 U.S.C. § 636(b)(1) (providing that the district court "shall make a de novo determination of those portions of the [R & R] to which objection is made"). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988). Those portions of a magistrate judge's report and recommendation to which no objection has been made

are reviewed for clear error. See Lombardo v. United States, 222 F. Supp. 2d 1367, 1369 (S.D. Fla. 2002); see also Macort v. Prem, Inc., 208 F. App'x 781, 784 (11th Cir. 2006) ("Most circuits agree that [i]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.") (internal quotation marks and citations omitted). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

Insofar as Petitioner's claims involve allegations of ineffective assistance of counsel, the two-pronged test established in Strickland v. Washington, 466 U.S. 668 (1984) applies. "First, the defendant must show that counsel's performance fell below a threshold level of competence. Second, the defendant must show that counsel's errors due to deficient performance prejudiced his defense such that the reliability of the result is undermined." Tafero v. Wainwright, 796 F.2d 1314, 1319 (11th Cir. 1986). Under the first prong of the Strickland test, Petitioner "must establish that no competent counsel would have taken the action that his counsel did take." Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). Under the second prong, Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

III. Discussion

In his Objections, Movant purports to object to Judge Reid's resolution of claims One, Four, Five, Eight,[1] Nine, Ten, and Twelve. (See Obj. at 1, 4, 9.) However, although Movant's Objections assert arguments pertinent to Claims One, Four, Five, Eight, and Nine, the Court can discern no specific objections or arguments pertinent to Claims Ten and Twelve. The Court has reviewed Judge Reid's resolution of Claims Two, Three, Six, Seven, Ten, Eleven, Twelve, Thirteen, Fourteen, and Fifteen for clear error and finds that Judge Reid's findings and conclusions as to those claims are not clearly erroneous. Accordingly, the Court adopts the Report as to those claims. The Court will discuss the remaining claims in turn.

a. Claims One and Five

In Claim One, Movant asserts that he received ineffective assistance of counsel when his attorney permitted him to plead guilty to the wrong statute. (Mot. at 5.) Specifically, he claims that he should have been charged with violating 18 U.S.C. § 1028 instead of 18 U.S.C. § 1029, because social security numbers are "means of identification" and not "access devices." (Id.) As such, Movant argues that he has been wrongly convicted of 18 U.S.C. § 1029 and that the Court was without authority to impose judgment upon him. (Id.) In related Claim Five, Movant argues that due to counsel's ineffectiveness, he

[1] Although Movant does not explicitly state that he is objecting to the Report's findings as to Claim Eight, the argument asserted under Roman Numeral III of the Objections clearly pertains to the restitution issue asserted in Claim Eight. (See Obj. at 5-6.)

was subjected to a ten-year statutory maximum under 18 U.S.C. § 1029, rather than a five-year statutory maximum under 18 U.S.C. § 1028. (Id. at 11.)

As Judge Reid observed, Movant argued on direct appeal that he was mischarged under 18 U.S.C. § 1029(a)(3) . Sajous, 704 F. App'x at 825. The Eleventh Circuit found that by pleading guilty, Movant had waived any non-jurisdictional challenge to the validity of his information. Id. It further found that to the extent Movant asserted this claim as one for ineffective assistance of counsel, it was for this Court to address the issue in the first instance. Id.

Judge Reid found Claims One and Five to be meritless. She reasoned that Movant pled guilty to 18 U.S.C. § 1029(a)(3), which criminalizes the knowing possession with the intent to defraud "fifteen or more devices which are counterfeit or unauthorized access devices[.]" The statute defines "access device" as

> any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument)[.]

18 U.S.C. § 1029(e)(1). The Eleventh Circuit has squarely held that social security numbers qualify as "access devices" under 18 U.S.C. § 1029(e)(1). United States v. Wright, 862 F.3d 1265, 1275 (11th Cir. 2017). Judge Reid observed that although Wright was decided after Movant's conviction, the Eleventh Circuit had previously stated that social security numbers could qualify as access devices. (Report at 19 (citing United States v. Siler, 624 F. App'x 990, 991 (11th Cir. 2015); United States v. Kannell, 545 F. App'x

881, 886 (11th Cir. 2013)).) Consequently, Judge Reid found that Movant was convicted under the correct statute, and was properly facing a ten-year statutory maximum. (Id.)

In his Objections, Movant argues that Congress did not intend for social security numbers to qualify as "access devices" under Section 1029, and no competent counsel would have failed to assert this argument. (Obj. at 1-3.) He further argues that a social security number can only become an access device "when used," and he was only charged with possessing access devices. (Id. at 2-3.) However, Movant does not specifically object to Judge Reid's finding that this claim is foreclosed by binding Eleventh Circuit precedent.

The Court finds that Movant failed to specifically object to Judge Reid's findings and conclusions on this claim, and Judge Reid's findings and conclusions are not clearly erroneous. Wright, 862 F.3d at 1275 ("[A] social security number qualifies as an 'access device' under the definition in 18 U.S.C. § 1029(e)(1)[.]"); see also Siler, 624 F. App'x at 991 ("A Social Security number can be an access device."); Kannell, 545 F. App'x at 886 (explaining that a claim number was an access device used "in combination with another access device, such as a social security number"). Counsel cannot be deemed ineffective for failing to raise a meritless claim.[2] Card v. Dugger, 911 F.2d 1494, 1520 (11th Cir. 1990) (citing Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987); Cross v. United States, 893 F.2d 1287, 1290 (11th Cir. 1990)).

Therefore, the Court adopts the Report as to Claims One and Five.

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[2] To the extent that Movant argues that his appellate attorney was ineffective for failing to assert Claim One on appeal, the Court finds that the claim fails because appellate counsel did raise that issue on appeal—the Eleventh Circuit simply found that the claim had been waived. Sajous, 704 F. App'x at 825.

b. Claim Four

In Claim Four, Movant asserts that he received ineffective assistance of counsel when his attorney failed to argue factual inaccuracies. (Mot. at 10.) He asserts that he gave his attorney

> a list of 35 inaccuracies. He started off with my list and made 5 objections of which all 5 issues were corrected by the judge's order. At a rate of 100% success I cannot fathom why he did not stick to my instructions and continue correcting inaccuracies. Because he was ineffective and failed to do so the judge relied on and used at least 10 misinformations and misunderstandings that were materially untrue regarding a prior criminal record, and material false assumptions as to facts relevant to sentencing . . . .

(Id.)

Judge Reid found that this claim "is bereft of any factual support. He does not provide the court with any detail as to what these alleged inaccuracies are that counsel failed to argue, nor does he state what 'misinformation' was relied upon in determining his sentence. Such bare and conclusory claims are subject to dismissal." (Report at 24 (citing Boyd v. Comm'r, Ala. Dep't of Corrs., 697 F.3d 1320, 1333-34 (11th Cir. 2012)).) Judge Reid further found that to the extent that Movant attempted to provide new arguments regarding this "misinformation" in his Traverse/Reply brief, the claims should not be considered because "a traverse is not the proper vehicle to raise for the first-time new arguments for relief." (Id. (citing Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994); Klauer v. McNeil, No.3:07CV541, 2009 WL 2399928, at *30 (N.D. Fla. July 31, 2009); Cleckler v. McNeil, No.3:07CV283, 2009 WL 700828, at *11 n.4 (N.D. Fla. Mar.16, 2009)).) Judge Reid found that the rule announced in Clisby v. Jones, 960 F.2d

925, 935-36 (11th Cir. 1992) (en banc),[3] does not require consideration of claims or arguments raised for the first time in a traverse. (Id. at 25.)

In his Objections, Movant argues that he informed his trial and appellate attorneys "that the information regarding a prior criminal record contained in the [presentence investigation report ("PSR")] was false and instructed the both of them to object to it so that it would not be used at sentencing or during appeal respectively." (Obj. at 3.) He appears to argue that the false information pertained to a prior state court criminal conviction dated April 1, 2010, in Case No. F10-009665. (Id.) He argues that trial counsel's failure to raise the issue rendered the entire sentencing procedure invalid as a violation of due process. (Id. (citing Townsend v. Burke, 334 U.S. 736, 741 (1948)).) He argues that no competent counsel would have failed to raise the PSR's factual inaccuracies. (Id. at 4.) However, he does not object to Judge Reid's finding that his 2255 Motion is "bereft of any factual support" with respect to this claim, (Report at 24), that it is improper to assert new claims in a traverse/Reply brief, (id), and that Clisby does not require the court to address claims asserted for the first time in a traverse, (id. at 25).

The Court finds that Movant failed to specifically object to any of Judge Reid's findings or conclusions on this claim, and Judge Reid's findings and conclusions on this claim are not clearly erroneous. Claim Four is fatally deficient because it fails to provide a factual basis for the ineffective assistance of counsel claim. Although Movant alleges

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[3] In Clisby, the Eleventh Circuit held that district courts must "resolve all claims for relief raised in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1988), regardless whether habeas relief is granted or denied." 960 F.2d at 936. The rule in Clisby applies to 2255 motions. Rhode v. United States, 583 F.3d 1289, 1291 (11th Cir. 2009).

that his attorney failed to object to factual inaccuracies, the Motion does not indicate what those factual inaccuracies are, where they appeared, or how the Court relied upon them. Without this information, it is impossible for the Court to determine whether (1) no competent counsel would have failed to object to these factual inaccuracies, and (2) whether counsel's failure to object prejudiced Movant. Movant's failure to include facts supporting this claim is puzzling—and frankly, inexcusable—considering that Claim Four is handwritten on page 10 of the Motion under the heading: "Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.)" (Mot. at 10.) Despite these instructions, Movant included only bare and conclusory claims of ineffective assistance of counsel. Bare and conclusory claims are subject to summary dismissal. Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991); see also Chavez v. Sec'y Fla. Dep't of Corrs., 647 F.3d 1057, 1061 (11th Cir. 2011) ("The allegations must be factual and specific, not conclusory. Conclusory allegations are simply not enough to warrant a hearing."); San Martin v. McNeil, 633 F.3d 1257, 1271 (11th Cir. 2011) ("'An evidentiary hearing may be necessary where the material facts are in dispute, but a petitioner is not entitled to an evidentiary hearing when his claims are merely conclusory allegations unsupported by specifics.'") (quoting Pugh v. Smith, 465 F.3d 1295, 1300 (11th Cir. 2006)). The fact that Movant provided factual support for this claim in his Traverse/Reply brief is inadequate—failing to include the factual predicate for the claim in the Motion deprived the Government of an opportunity to effectively respond to the claim.[4] See

[4] The Court further notes that Movant's Traverse/Reply brief, which is thirty-four pages in length, exceeds the page limitations established by the Local Rules of the Southern

Herring v. Sec'y, Dep't of Corrs., 397 F.3d 1338, 1342 (11th Cir. 2005) ("[A]rguments raised for the first time in a reply brief are not properly before a reviewing court.") (quoting United States v. Coy, 19 F.3d 629, 632 n.7 (11th Cir. 1994)); United States v. Whitesell, 314 F.3d 1251, 1256 (11th Cir. 2002); United States v. Dicter, 198 F.3d 1284, 1289 (11th Cir. 1999); United States v. Martinez, 83 F.3d 371, 377 n.6 (11th Cir. 1996).

Regardless, even if the Court references the Traverse/Reply brief, Claim Four fails on the merits. As stated above, Movant's Objections identify only one "inaccuracy" to which counsel failed to object at sentencing—specifically, he asserts that "the court used the false information, pertaining to a prior criminal record dated April 1, 2010 (Case # F10009665) . . . ." (Obj. at 3.) Although the Objections do not identify what "false information" the Court used, Movant's Traverse/Reply brief asserts that the Probation Office incorrectly assigned a criminal history point for his conviction in Case No. F10-009665. (D.E. 30 at 32.) He asserts that the Probation Office should not have added a criminal history point for that conviction because he did not "do at least 30 days in jail or receive more than one year probation for the misdemeanor." (Id.)

The PSR assigned one criminal history point for Movant's convictions in Case No. F10-009665 pursuant to United States Sentencing Guideline ("U.S.S.G.") § 4A1.1(c) (2014).[5] (PSR ¶ 39.) That Guideline instructs: "Add **1** point for each prior sentence not

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District of Florida by twenty-four pages (without the Court's permission). S.D. Fla. L.R. 7.1(c)(2) ("Absent prior permission of the Court . . . a reply memorandum shall not exceed ten (10) pages.").

[5] Movant was sentenced on June 1, 2015, when the 2014 Guidelines were in effect.

counted in (a) or (b), up to a total of **4** points for this subsection."[6] U.S.S.G. § 4A1.1(c). "The 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." U.S.S.G. § 4A1.2(a). "Sentences for all felony offenses are counted." U.S.S.G.§ 4A1.2(c).

The state court's judgment in Case No. F10-009665 in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, is available on the state court's online docket. See https://www.jud11.flcourts.org/Self-Help-Center/Criminal-Cases (last visited July 9, 2019). The Court takes judicial notice of the state court's online docket and judgment. See United States v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994) ("[A] court may take notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation.").

According to the state court's judgment, Movant pled nolo contendere in Case No. F10-009665 to nine felonies. Those nine felonies are accurately reflected in Paragraph 39 of the PSR. According to the online docket, Movant was sentenced for those nine felonies to three years' probation. That sentence is accurately reflected in Paragraph 39 of the PSR. Pursuant to Section 4A1.1(a)(2), the sentences for those nine felonies are counted as a single sentence because they resulted from offenses contained in the same charging

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[6] Section 4A1.1(a) adds 3 points "for each prior sentence of imprisonment exceeding one year and one month"; Section 4A1.1(b) adds 2 points "for each prior sentence of imprisonment of at least sixty days not counted in (a)." U.S.S.G. § 4A1.1(a) & (b).

instrument and/or were imposed on the same day. U.S.S.G. § 4A1.1(a)(2). Consequently, the PSR correctly assigned one criminal history point to Case No. F10-009665 pursuant to U.S.S.G. § 4A1.1(c). Because the PSR correctly assigned one criminal history point to Case No. F10-009665, counsel cannot be deemed ineffective for failing to object at sentencing or raise it as an issue on appeal. Card, 911 F.2d at 1520 ("Counsel cannot be labeled ineffective for failing to raise issues which have no merit.").[7]

Accordingly, the Court adopts the Report as to Claim Four as supplemented herein.

c. Claim Eight

In Claim Eight, Movant asserts that he received ineffective assistance of counsel when his attorney "volunteered" him to pay restitution without his consent. (Mot. at 14.) He argues that restitution is not warranted for mere possession of unauthorized access devices. (Id.)

Judge Reid found that Movant's challenge to the imposition of restitution is not cognizable under Section 2255: "Restitution claims, including ineffectiveness claims premised upon a failure to object to a restitution amount, are not cognizable in § 2255 proceedings since they do not challenge the movant's custody." (Report at 30-31 (citing Arnaiz v. Warden, Fed. Satellite Low, 594 F.3d 1326 (11th Cir. 2010); Mamone v. United

[7] The Court further notes that during the sentencing hearing, the Court asked Movant whether he had discussed the revised presentence investigation report with his attorney, and Movant responded: "Yes, your Honor." (Sentencing Hr'g Tr., June 1, 2015 (D.E. 56) at 6:5-7.) Thereafter, the Court heard counsel's objections to the PSR and considered the Parties' arguments for variances below the Guidelines range. (Id. at 6:16 – 46:6.) The Court then specifically asked Movant if he had "anything [he] want[ed] to say," and he replied "No." (Id. at 46:5-7.) If the PSR contained factual inaccuracies, Movant had the opportunity to inform the Court.

States, 559 F.3d 1209, 1211 (11th Cir. 2009); Blaik v. United States, 161 F.3d 1341, 1343 (11th Cir. 1998)).)

In his Objections, Movant continues to argue that the restitution order was "invalid/illegal." (Obj. at 5 (citing Hughey v. United States, 495 U.S. 411 (1990); United States v. Cobbs, 967 F.2d 1555 (11th Cir. 1992)).) However, Movant does not specifically object to Judge Reid's conclusion that a challenge to a restitution order is not cognizable in a 2255 proceeding.

The Court finds that Movant failed to specifically object to Judge Reid's findings and conclusions on this claim, and Judge Reid's findings and conclusions are not clearly erroneous. Arnaiz, 594 F.3d at 1330 (holding, where a prisoner filed a petition for writ of habeas corpus under 28 U.S.C. § 2241 asserting a claim of ineffective assistance of counsel for failure to object to restitution order, that "habeas corpus cannot be used to challenge just the restitution part of a sentence"); Mamone, 559 F.3d at 1211 (holding that a Section 2255 movant cannot challenge a restitution order with a motion to vacate his sentence—even when joined with a claim seeking release from custody—because the language of section 2255 limits its application to "a prisoner in custody . . . claiming the right to be released"); Blaik, 161 F.3d at 1343 (holding that Section 2255 does not provide a remedy for relief from restitution order).

Therefore, the Court adopts the Report as to Claim Eight.

d. Claim Nine

In Claim Nine, Movant asserts that counsel was ineffective for failing to object to the loss amount of $1,151,482. (Mot. at 15.) He argues that the Government did not prove

the restitution amount by a preponderance of the evidence and, in fact, that the Government admitted there was no proof. (Id.)

Judge Reid found that Movant could not establish ineffective assistance with respect to the 16-level increase to Movant's base offense level pursuant to U.S.S.G. § 2B1.1(b)(1)(I):

> Section 2B1.1 of the 2014 Guidelines provides for a 16-level increase for a fraud offense involving a loss between $1,000,000 and $2,500,000. U.S.S.G. § 2B1.1(b)(1) (2014). The total loss amount is the "greater of actual loss or intended loss." See U.S.S.G. § 2B1.1 cmt. n.3(A). "Intended loss" is specifically defined as the "pecuniary harm that was intended to result from the offense," and includes pecuniary harm "that would have been impossible or unlikely to occur." Id. Sentencing solely based on intended loss is appropriate even where no actual loss has occurred. See United States v. Menichino, 989 F.2d 438, 442 (11th Cir. 1993).
>
> Here, movant agreed in his factual proffer that he knowingly possessed, with the intent to defraud, the social security numbers of more than fifteen individuals. (Cr-DE#41). As stated in the PSI, however, exactly 345 fraudulent tax returns were filed from an IP address tied to movant's residence. (PSI ¶13). Based on the total refunds claimed involving the 345 individual victims, the intended loss amount was $1,151,482. (PSI ¶17). Although the IRS only actually refunded a total of $21,606, the movant received a 16-level increase to his base offense level pursuant to the guidelines because the intended loss amount was more than $1,000,000 but less than $2,500,000. (PSI ¶23). Because the 16-level increase was warranted under the 2014 Sentencing Guidelines, counsel was not ineffective for failing to raise a nonmeritorious objection regarding the loss amount at sentencing. Moreover, because no objection was made, the government did not have the burden of establishing the loss amount by a preponderance of the evidence, and the court only needed to make a "reasonable estimate of loss, given the available information." United States v. Liss, 265 F.3d 1220, 1230 (11th Cir. 2001).
>
> However, even if counsel could be deemed ineffective for failing to object to the loss amount, there is nothing to suggest that the government would have been unable to meet its burden of proving the loss amount by a preponderance of the evidence. Although the PSI states that there was "no direct evidence that Sajous himself filed" the tax returns, movant admitted to

> knowingly possessing the personal identifying information with the intent to defraud, and the government would have easily been able to show that the information he possessed was ultimately used to file the fraudulent tax returns. (PSI ¶¶11-13; Cr-DE#41).
>
> Furthermore, the movant's reliance on the government's statements at sentencing is not persuasive. While the government did state at the sentencing hearing that it "[couldn't] prove anything," it made this statement specifically in reference to the stacks of unnamed prepaid debit cards that were found at movant's home, and not as to the social security numbers that were used to file the fraudulent tax returns. (Cr-DE#56:10). Whether movant was the one that physically filed the tax returns is immaterial as it is clear, from his own admissions, that he was a significant player in the criminal activity, using his residence to store the unauthorized access devices. Accordingly, because there is nothing in the record to suggest that the District Court would have sustained an objection to the loss amount, movant's claim 9 should be denied.

(Report at 31-33.)

In his Objections, Movant first objects to a different enhancement that he received under U.S.S.G. § 2B1.1(b)(2), which provides for a 6-level enhancement to offenses involving 250 or more victims. (Obj. at 8.) However, Movant did not raise this claim in his Motion, and the Court exercises its discretion to not consider it for the first time here. 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").

Next, Movant argues that his attorneys and this Court "misinterpreted the sentencing enhancement under U.S.S.G. § 2B1.1(b)(1)(I) for 'loss amount' . . . ." (Obj. at 8.) It appears that Movant is arguing that "loss amount" under Section 2B1.1(b)(1) cannot be cause by merely possessing access devices, and must be caused by specific conduct. (Id. citing Hughey, 495 U.S. 411; Cobbs, 967 F.2d 1555; Nelson v. Colorado, 137 S. Ct. 1249).)

However, Movant did not raise this claim in his Motion, and the Court exercises its discretion to not consider it for the first time here. Williams, 557 F.3d at 1292.

The Court finds that Movant failed to specifically object to any of Judge Reid's findings or conclusions on this claim, and Judge Reid's findings and conclusions on this claim are not clearly erroneous. Therefore, the Court adopts the Report as to Claim Nine.

e. Motion to Terminate Supervised Release (D.E. 50)[8]

Finally, in his Motion to Terminate Supervised Release, Movant argues that because he was "illegally sentenced," the Court should terminate his term of 36 months' supervised release "to ameliorate for this travesty of justice . . . ." (D.E. 50 at 1.) Because the Court finds that Movant was not illegally sentenced, the Court denies his Motion to Terminate Supervised Release. And in any event, Movant is ineligible for termination of supervised release because he has not served one year of supervised release. 18 U.S.C. § 3583(e)(1) (providing that the court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . . ."); see also United States v. Gladden, No. 1:12–cr–334–WSD, 2015 WL 6506306, at *3 (N.D. Ga. Oct. 26, 2015) ("Because Gladden has not been on supervised release for at least one year, he is not eligible to be considered for early termination of his supervised release under 18 U.S.C. § 3583(e)(1).");

IV. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

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[8] The Motion to Terminate Supervised Release was only filed in the instant civil case at Docket Entry 50.

1. The Report of the Magistrate Judge issued May 8, 2109 (D.E. 57) is **ADOPTED** as supplemented herein;

2. Movant's Motion under 28 U.S.C. § 2255 (D.E. 1) is **DENIED**;

3. Movant's Motion to Terminate Supervised Release (D.E. 50) is **DENIED**;

4. A certificate of appealability **SHALL NOT ISSUE**;

5. All pending motions are **DENIED AS MOOT**; and

6. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 11th day of July, 2019.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12836-E

ALAN RENE SAJOUS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: GRANT and LUCK, Circuit Judges.

BY THE COURT:

Alan Sajous has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's December 19, 2019, order denying him a certificate of appealability ("COA") to appeal the district court's order denying his 28 U.S.C. § 2255 motion. Upon review, Sajous's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.