[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12701
Non-Argument Calendar

D.C. Docket Nos. 1:17-cv-24294-DPG; 1:14-cr-20116-DPG-1

RICHARD ANTHONY SILER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(April 21, 2021)

Before JORDAN, GRANT, and ANDERSON, Circuit Judges.

PER CURIAM:

Richard Siler, a federal prisoner proceeding pro se, appeals the district court's denial of his petition under 28 U.S.C. § 2255. We granted a certificate of appealability ("COA") on three issues: (1) whether Siler's appellate counsel was ineffective for not arguing that the district court erred by refusing to clarify a jury question; (2) whether the district court erred by failing to address whether the cumulative error of claims 1 through 12 warranted habeas relief; and (3) whether the district court abused its discretion in failing to hold an evidentiary hearing.

I.

In § 2255 proceedings, we review a district court's legal conclusions *de novo* and its factual findings for clear error. *Rhode v. United States*, 583 F.3d 1289, 1290 (11th Cir. 2009). The scope of review on appeal is limited to the issues specified in the COA. *Id.* at 1290-91.

The Sixth Amendment guarantees criminal defendants the right to the assistance of counsel during criminal proceedings against them. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that: (1) his or her counsel's performance was deficient, i.e., the performance fell below an objective standard of reasonableness; and (2) he or she suffered prejudice as a result of that deficiency. *Id.* at 687-88. The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's performance so undermined the proper

functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* at 686. Ineffective assistance of counsel claims present mixed questions of law and fact, which we review *de novo*. *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014).

To establish deficient performance, the defendant must show that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. *Strickland*, 466 U.S. at 690. "Surmounting *Strickland's* high bar is never an easy task." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal quotation marks omitted). There is a "strong presumption" that an attorney's performance was reasonable, and that their strategic decisions represented "the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689-90.

Regarding the prejudice component, the Supreme Court has explained "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

Once a court has determined that the defendant fails to establish either the performance or prejudice prong, it need not address the remaining prong. *Strickland*, 466 U.S. at 697.

Claims of ineffective appellate counsel are governed by the same standards applied to trial counsel under *Strickland*. *Dell v. United States*, 710 F.3d 1267, 1273 (11th Cir. 2013). In the appellate context, the Supreme Court has observed that "it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). "[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Id.* Indeed, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." *Jones v. Barnes*, 463 U.S. 745, 753 (1983). Appellate counsel is not ineffective for failing to raise claims reasonably considered to be without merit. *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000).

We review a district court's response to a jury question solely for an abuse of discretion. *United States v. Lopez*, 590 F.3d 1238, 1247 (11th Cir. 2009). District courts have considerable discretion as to the extent and character of supplemental jury instructions, but they do not have discretion to misstate the law or confuse the jury. *Id.* "A challenged supplemental jury instruction is reviewed as part of the entire jury charge, in light of the indictment, evidence presented and argument of counsel to determine whether the jury was misled and whether the jury understood the issues." *Id.* at 1248. We will reverse only when we are left

with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations. *Id.*

A defendant who challenges the district court's handling of a jury question must show that the district court's answer prejudiced him. *United States v. Pacchioli*, 718 F.3d 1294, 1306 (11th Cir. 2013). The district court has broad discretion when responding to a jury request that evidence be reread. *United States v. Delgado*, 56 F.3d 1357, 1370 (11th Cir. 1995). No reversible error exists if the district court's original and supplemental instructions accurately present the substantive law. *United States v. Sanfilippo*, 581 F.2d 1152, 1154 (5th Cir. 1978).

Here, appellate counsel was not ineffective because the district court did not abuse its discretion in responding to the jury's question. At trial, Siler failed to develop a record conclusively establishing whether it is legal, in some circumstances, to sell another person's Social Security number. It therefore would have been improper for the district court to answer the jury's question with a simple "yes," as Siler requested. Doing so would have required the district court to interpret ambiguous evidence in Siler's favor and would have misled the jury by presenting new facts not already found in the trial record.

The district court also had broad discretion in deciding whether to reread certain evidence potentially bearing on this topic. Siler asked the district court to direct the jury to a particular witness's testimony that some private businesses

legally sell "client information," but that testimony did not specifically resolve the jury's question regarding Social Security numbers. Consequently, there was a significant risk that rereading this evidence would only confuse or mislead the jury. The district court therefore acted within its discretion by instead directing the jury to rely on the evidence in the record and the original jury instructions.

Because the district court did not abuse its discretion in answering jury's question, Siler's appellate counsel did not act ineffectively by failing to raise this non-meritorious claim. Accordingly, we affirm as to this issue.

II.

We review *de novo* whether the district court adequately addressed all of the claims in a § 2255 motion. *Dupree*, 715 F.3d at 1298. We have held that a district court must resolve all claims for relief raised in a § 2255 motion, regardless of whether relief is granted or denied and regardless of whether the claims for relief arise out of the same operative facts. *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (addressing a § 2254 petition); *see also Rhode*, 583 F.3d at 1291–92 (applying *Clisby* in the § 2255 context). A "claim for relief" is defined as "any allegation of a constitutional violation." *Clisby*, 960 F.2d at 936. Allegations of distinct constitutional violations constitute separate claims for relief, even if the allegations arise from the same operative facts. *Id.*

If the district court failed to consider a claim raised in a § 2255 motion, we will vacate and remand the case to allow the district court to consider the claim. *Clisby*, 960 F.2d at 938. Under *Clisby*, our only role is to determine whether the district court failed to address a claim, and, where we determine that it did, to vacate the judgment without prejudice and remand the case for consideration of the claim. *Dupree*, 715 F.3d at 1299. We do not address whether the underlying claim is meritorious. *Id.*

Here, the district court implicitly addressed Siler's cumulative-error claim by separately addressing each of his other claims and finding no error by trial or appellate counsel. Where there is no error or only a single error, there can be no cumulative error. *United States v. Gamory*, 635 F.3d 480, 497 (11th Cir. 2011). The district court also found explicitly that none of the alleged errors, either individually or cumulatively, deprived Siler of his right to a fair trial and due process of law. Accordingly, we affirm as to this issue as well.

III.

We review the district court's denial of an evidentiary hearing for abuse of discretion. *Breedlove v. Moore*, 279 F.3d 952, 959 (11th Cir. 2002). Whenever a § 2255 movant alleges facts that, if true, would entitle him to relief, the district court should order an evidentiary hearing. *Aron v. United States*, 291 F.3d 708, 714-15 (11th Cir. 2002). The district court is not required to hold a hearing,

however, if the petitioner's claims are affirmatively contradicted by the record or are patently frivolous. *Id.*; *see also* 28 U.S.C. § 2255(b) (establishing an exception to the notice and evidentiary hearing requirement where the record conclusively shows that the prisoner is entitled to no relief).

A party who fails to object to a factual or legal finding contained in a magistrate judge's report and recommendation waives the right to challenge that finding on appeal, if the party was informed of the time period for objecting and the consequences on appeal for failing to object. 11th Cir. R. 3-1. In the absence of a proper objection, however, we may review on appeal for plain error when necessary in the interests of justice. *Id.*

Here, the district court did not commit plain error or abuse its discretion by denying Siler an evidentiary hearing because the claims in his § 2255 motion were unsupported by the record. Siler's claims at issue on appeal raised purely legal questions, not disputed issues of fact, and thus his § 2255 motion did not allege facts that, if true, would have entitled him to relief. An evidentiary hearing was therefore unnecessary, and we affirm as to this final issue.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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April 21, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-12701-HH
Case Style: Richard Siler v. USA
District Court Docket No: 1:17-cv-24294-DPG
Secondary Case Number: 1:14-cr-20116-DPG-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Christopher Bergquist, HH at 404-335-6169.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 19-12701

District Court Docket Nos.
1:17-cv-24294-DPG; 1:14-cr-20116-DPG-1

RICHARD ANTHONY SILER,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: April 21, 2021
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 17-CV-24294-GAYLES/MCALILEY

RICHARD ANTHONY SILER,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION
ON MOTION TO VACATE PURSUANT TO 28 U.S.C. § 2255

Pro se movant, Richard Siler, has filed this motion to vacate, pursuant to 28 U.S.C. § 2255, attacking the constitutionality of his conviction and sentence for use of unauthorized access devices and related offenses, entered following a jury verdict in case number 14-CR-20116-GAYLES.[1] (ECF Nos. 1, 6). The motion has been fully briefed, (ECF Nos. 11, 13, 19, 20), and has been referred to me for a report and recommendation. (ECF No. 2, 28).

For the reasons set forth below, I recommend that the Court deny the motion to vacate.

[1] The criminal proceedings against movant will be referenced in this Report and Recommendation as (Cr. ECF No. __).

I. MOVANT'S CLAIMS

The Court liberally construes the motion, as is afforded *pro se* litigants. *Haines v. Kerner,* 404 U.S. 519 (1972). Movant raises the following claims that his trial and appellate counsel were ineffective, in violation of his Sixth Amendment right to the effective assistance of counsel:

Ineffective Assistance of Appellate Counsel

1. Counsel was ineffective for failing to argue on appeal that the government used "judicial bias" by introducing an old check from movant's corporate account. (ECF No. 1:9).

2. Counsel was ineffective for failing to argue on appeal that trial counsel was ineffective for failing to move to suppress movant's handwritten confession. (ECF No. 1:9).

3. Counsel was ineffective for failing to demand all recordings between movant and Freddy Howard, the government's chief witness. (ECF No. 1:10).

5. Counsel was ineffective for failing to argue on appeal that trial counsel was ineffective for failing to call movant's fellow business associates at trial. (ECF No. 1:11).

6. Counsel was ineffective for failing to argue on appeal that the District Court abused its discretion by refusing to clarify a jury question regarding the sale of personal identifying information. (ECF No. 1:12).

7. Counsel was ineffective for failing to argue on appeal that the District Court erred by misapplying the intended loss enhancement. (ECF No. 1:13).

10. Counsel was ineffective for failing to argue on appeal that the District Court erred by re-sentencing movant outside the guideline range. (ECF No. 1:14).

11. Counsel was ineffective for failing to argue on appeal that cumulative errors committed by trial counsel deprived him of his constitutional right to representation. (ECF No. 1:16).

Ineffective Assistance of Trial Counsel

4. Counsel was ineffective for refusing to call movant's employees as trial witnesses, who would have verified that he legally brokered personal identifying information. (ECF No. 1:11).

8. Counsel was ineffective for failing to challenge, at sentencing, the District Court's misapplication of the abuse-of-trust enhancement. (ECF No. 1:13).

9. Counsel was ineffective for failing to argue that the District Court should have re-sentenced him within the sentencing guidelines range. (ECF No. 1:14).

Movant also filed a supplemental complaint, in which he raised the following ground for relief:

12. Counsel was ineffective for failing to object to the government's improper statements during closing argument. (ECF No. 11:2).

II. PROCEDURAL BACKGROUND

A. Indictment

Movant was charged by Indictment with the use of unauthorized access devices (Count 1), in violation of 18 U.S.C. § 1029(a)(2), possession of fifteen or more unauthorized access devices (Counts 2 and 6), in violation of 18 U.S.C. § 1029(a)(3), and six counts of aggravated identity theft (Counts 3-5, 7-9), in violation of 18 U.S.C. §

1028A(a)(1). (Cr. ECF No. 11). Prior to trial, the Court granted the government's motion to dismiss the aggravated identity theft charges in Counts 5, 8, and 9. (Cr. ECF No. 45).

B. Evidence at Trial

The government's chief witness Freddy Howard testified that he first began working as a tax-preparer in 1983. (Cr. ECF No. 81: 60). In 2004, he pled guilty to filing false tax returns on behalf of several clients and was sentenced to prison. (*Id.*:61-62). After his release, he resumed his tax preparation business, and in 2012, he began preparing fraudulent returns. (*Id.*:62-63). In December 2013, the Federal Bureau of Investigation ("FBI") confronted him about his criminal activities and a grand jury charged him with tax fraud. (*Id.*:64). Howard pled guilty, and as part of his plea agreement, agreed to cooperate with the FBI in the hopes that he would ultimately receive a sentence reduction. (*Id.*:64-65).

As part of his cooperation, Howard provided information about movant, who he knew from prior dealings. (*Id.*:66-68). In 2013, before he cooperated with the government, Howard met movant, who gave him a list of identifying information for six or seven individuals. (*Id.*:67-68). Howard told movant that he would file tax returns on behalf of those individuals without their knowledge or permission. (*Id.*:68-69). The IRS issued an approximately $70,000 refund for one of the tax claims, and movant told Howard that he did not want the check, written in someone else's name, because he had no way of cashing it. (*Id.*:71). Instead, movant agreed to accept a $10,000 check in exchange for the $70,000 refund check that he was unable to cash. (*Id.*). Howard's associate, Joseph Exantus, then

issued a $10,000 check to movant in accordance with the agreement. (*Id.*:71-72). At trial, that check was moved into evidence. (*Id.*:72).

In 2014, the FBI-monitored telephone calls in which movant told Howard that he had access to a large number of identities. (*Id.*:78-79). Howard told movant that he "wanted to file," meaning Howard would file fraudulent tax returns using the identities movant provided. (*Id.*:80).

While he cooperated with the FBI, Howard purchased personal identifying information from movant on two occasions. (*Id.*:76). Howard made an initial payment to movant for the identity information movant provided, using funds the FBI provided. (*Id*:76-77, 80-81). Howard told movant that once the tax refunds were received, movant would receive additional money. (*Id.*:81). The first FBI-monitored buy was for 100 names, and the second was for approximately 5,200 names. (*Id.*:76-77). Howard paid movant $600 in the first transaction, and $6,200 in the second. (*Id.*:77).

FBI agent Timothy Lawler testified. He investigated Freddy Howard and approached him to solicit his cooperation. (Cr. ECF No. 80:128-130). Howard agreed to identify individuals who had provided him with stolen identities in the past, including movant. (*Id.*:130). Through the two FBI-monitored buys, and with Howard's cooperation, the FBI purchased approximately 5,300 identities from movant, for approximately $6,900. (*Id.*:133). This included social security numbers, and Lawler submitted those numbers to the Social Security Office to verify that they belonged to real people. (*Id.*:171-173). A witness from the Social Security Administration testified at trial that the numbers were assigned to real people. (Cr. ECF No. 81:50, 54-56). The witness also testified on cross-

examination that certain businesses lawfully engaged in the sale of identities. (Cr. ECF No. 81:56).

Agent Lawler testified that after the second FBI-monitored buy was completed, he arrested movant, and read him his *Miranda*[2] rights. (Cr. ECF No. 80:185-88). Movant waived his rights and said he knew Howard had a tax preparation business and he assumed that the personal identifying information he sold Howard would be used to file fraudulent tax returns. (*Id.*:188-189). Movant also made this written statement: "I sold Freddy Howard records. I knew he did taxes, and I assumed he was using them to file through his office." (*Id.*:190-191).

Two individuals, whose identifying information appeared on the lists that movant sold, testified that they did not know movant and did not give him their personal identifying information. (*Id.*:121-126).

Defense counsel's theory of defense was that movant lawfully obtained the identities in the leads business, which involved selling to companies potential client lists, which lists included identity information. (Cr. ECF No. 82:19-20, 28-30). Trial counsel argued in closing that movant did not have an intent to defraud, and that he thought Howard was preparing legitimate tax returns for the individuals on the lists that he provided. (*Id.*:30-31). On rebuttal, the government argued that movant's intent was clear from his recorded conversations with Howard, and the fact that the individuals on the list did not give their

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

personal identifying information to movant nor did they need Howard to prepare their taxes. (*Id.*:35-36).

The jury found movant guilty of Count 1, use of unauthorized access devices, and Counts 3, 4, and 7, aggravated identity theft, and Count 6, possession of fifteen or more unauthorized access devices. (Cr. ECF No. 53). The jury acquitted him of Count 2, which also charged possession of fifteen or more access devices. (*Id.*)

C. Pre-Sentence Investigation Report and Sentencing Hearing

Prior to sentencing, the probation office prepared a Pre-Sentence Investigation Report ("PSI") (Cr. ECF No. 63). It set movant's base offense level at 6, pursuant to U.S.S.G. § 2B1.1, because the offense involved fraud. (PSI ¶ 19). That was increased by 18 levels pursuant to U.S.S.G. § 2B1.1(b)(1)(J), as movant was found accountable for an intended loss of more than $2,500,00 but less than $7,000,000 (*i.e.*, $2,614,000). (PSI ¶ 20). An additional two-level increase was applied pursuant to U.S.S.G. § 2B1.1(b)(11)(B)(i) because the offense involved the trafficking of unauthorized access devices. (PSI ¶ 21). Because movant abused a position of public or private trust, the offense level was further increased by two. (PSI ¶ 23). The total adjusted offense level was 28. (PSI ¶ 28).

Movant had nine criminal history points, resulting in a criminal history category of IV. (PSI ¶ 44). Based on a total offense level of 28 and a criminal history category IV, the advisory guideline range was 110 to 137 months' imprisonment, plus two years' imprisonment as to Counts 3, 4, and 7, the aggravated identity theft counts, to run consecutive to any term of imprisonment imposed on counts 1 and 6. (PSI ¶ 79). Statutorily,

movant faced a maximum term of ten years' imprisonment on Counts 1 and 6, plus two consecutive years' imprisonment on Counts 3, 4, and 7. (PSI ¶ 78).

Movant filed objections to the PSI. (Cr. ECF No. 64). The Court sentenced movant to 130 months' imprisonment as to Counts 1 and 6, to be served concurrently, and 24 months as to counts 3, 4 and 7 to be served concurrently with each other, but consecutive to Counts 1 and 6. (Cr. ECF No. 78:18). The Court also sentenced movant to a total of three years of supervised release. (*Id.*).

On direct appeal, movant argued the District Court erred by (1) denying his motion for a judgment of acquittal, in which he argued that there was insufficient evidence that he acted with an intent to defraud and (2) imposing a two-point enhancement for trafficking in unauthorized access devices. (Cr. ECF No. 98:4); *see also United States v. Siler*, 624 F. App'x 990, 991 (11th Cir. 2015). The Eleventh Circuit found that the evidence at trial supported movant's conviction but reversed and remanded for re-sentencing because the District Court improperly applied the two-point enhancement for trafficking in unauthorized access devices. *Siler*, 624 F. App'x at 991-92. The Eleventh Circuit stated that the appropriate guidelines range at sentencing should have been 92 to 115 months. *Id.* at 992.

On remand, the District Court applied an upward variance and imposed the same 130-month sentence on Counts 1 and 6 that it first imposed. (Cr. ECF No. 109:13). The Court did so relying on movant's criminal history and the seriousness of the offenses. (*Id.*:12-13). Movant again appealed and argued that the District Court improperly relied on an erroneous fact when it stated that the offense involved "thousands of victims and their

stolen identifications." (Cr. ECF No. 116:4); *see also United States v. Siler*, 671 F. App'x 739, 740 (11th Cir. 2016). The Eleventh Circuit rejected movant's argument and affirmed his conviction and sentence, finding that the Court's statement "injected no error into the decision-making process." *Siler*, 671 F. App'x at 741.

For purposes of the federal one-year limitations period, movant's judgment of conviction became final on **June 12, 2017,** when the Supreme Court denied movant's petition for writ of certiorari. (Cr. ECF No. 119). *See also Wainwright v. Sec'y Dep't of Corr.*, 537 F.3d 1282, 1283 (11th Cir. 2007). If movant wished to file a motion to vacate, he had to do so within one year of that date, or no later than **June 12, 2018.** *See Griffith v. Kentucky,* 479 U.S. 314, 321, n.6 (1986). On **November 3, 2017**, before that one-year period expired, Movant timely filed this § 2255 motion to vacate.[3] The government does not dispute that the motion was timely filed. (ECF No. 13). Thus, review on the merits is warranted.

III. STANDARD OF REVIEW

A. Section 2255

Collateral review is not a substitute for direct appeal, and the grounds for collateral attack on a final judgment, pursuant to 28 U.S.C. § 2255, are extremely limited. A prisoner is entitled to relief under § 2255 if the court finds that (1) the judgment was rendered without jurisdiction, or (2) is vulnerable to collateral attack because there has been a denial or infringement of the prisoner's constitutional rights, or (3) the sentence imposed was not

[3] An inmate's pleadings are deemed filed on the date they are signed and delivered to prison authorities for mailing to the court. *Houston v. Lack*, 487 U.S. 266, 269-70 (1988).

authorized by law, (4) or was otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(b). Thus, relief under § 2255 is reserved for "transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *Lynn v. United States,* 365 F.3d 1225, 1232-33 (11th Cir. 2004) (citations omitted); *United States v. Frady*, 456 U.S. 152, 165 (1982). If a court finds a claim under § 2255 valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b). The burden of proof is on movant to establish that vacatur of the conviction or sentence is required. *Beeman v. United States,* 871 F.3d 1215, 1221-1222 (11th Cir. 2017). For sentencing claims, movant has the burden of showing that the sentence imposed was unreasonable in light of the record and the factors set out in 28 U.S.C. § 3553(a). *United States v. Dean,* 635 F.3d 1200, 1209-10 (11th Cir. 2011).

To overcome a procedural default arising from a claim that a movant could have, but did not raise on direct appeal, the movant must demonstrate: (1) cause for failing to raise the claim and prejudice resulting therefrom; or, (2) that a miscarriage of justice excuses the procedural default because the movant is actually innocent. *See McKay v. United States,* 657 F.3d 1190, 1196 (11th Cir. 2011). The actual innocence exception is exceedingly narrow in scope as it concerns a petitioner's "actual" innocence, rather than his "legal" innocence. *Johnson v. Alabama,* 256 F.3d 1156, 1171 (11th Cir. 2001)(citations omitted).

The court should hold an evidentiary hearing only if the motion and records conclusively show that the prisoner is entitled to relief. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007); *Aron v. United States*, 291 F.3d 708, 714-15 (11th Cir. 2002).

B. Ineffective Assistance of Trial Counsel Principles

The Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *Harrington v. Richter*, 562 U.S. 86, 104 (2011). If a movant cannot meet one of *Strickland's* prongs, the court need not address the other. *Strickland*, 466 U.S. at 697 (explaining a court need not address both prongs of *Strickland* if the defendant makes an insufficient showing as to one). *See also Butcher v. United States*, 368 F.3d 1290, 1293 (11th Cir. 2004) (citations omitted).

To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) (citing *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000)). The presumption of reasonableness is even stronger when the court reviews the performance of experienced trial counsel. *Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir. 2005) (citation omitted). With regard to the prejudice requirement, a movant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466

U.S. at 694. For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993) (citations omitted). A defendant, therefore, must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart*, 506 U.S. at 369 (quoting *Strickland*, 466 U.S. at 687).

Furthermore, a § 2255 movant must provide factual support for his contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406-07 (11th Cir. 1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *See Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1333-34 (11th Cir. 2012).

Counsel's failure to raise a meritless claim, is not deficient performance. *United States v. Winfield*, 960 F.2d 970, 974 (11th Cir. 1992) (citing *Strickland*, 466 U.S. at 692-93). Nor is petitioner prejudiced by his counsel's failure to do so. *Hittson v. GDCP Warden*, 759 F.3d 1210, 1262 (11th Cir. 2014).

The Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail ... are few and far between." *Chandler*, 218 F.3d at 1313 (citations omitted). The test is not what the best lawyers would have done or even what most good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. *Dingle*, 480 F.3d 1092, 1099 (11th Cir. 2007) (citation omitted); *Williamson v.*

Moore, 221 F.3d 1177, 1180 (11th Cir. 2000) (citation omitted). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" *Dingle*, 480 F.3d at 1099 (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983)).

There is a strong presumption that counsel's decision to focus on certain issues, to the exclusion of others, is made in the exercise of his or her professional judgment. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (citing *Strickland*, 466 U.S. at 690). "That presumption has particular force when a petitioner bases his ineffective assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'" *Yarborough*, 540 U.S. at 8 (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)). Even if an act or omission of an issue is inadvertent, relief is not automatic. *Yarborough*, 540 U.S. at 8. The Sixth Amendment guarantees only reasonable competence, "not perfect advocacy judged with the benefit of hindsight." *Id.* (citing *Bell v. Cone*, 535 U.S. 685, 702 (2002); *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986)).

C. Ineffective Assistance of Appellate Counsel Principles

The Sixth Amendment does not require appellate counsel to raise on appeal every possible non-frivolous argument, so long as counsel uses professional judgment in making those choices. *Jones v. Barnes*, 463 U.S. 745, 753-54 (1983). The Supreme Court has recognized that "a brief that raises every colorable issue runs the risk of burying good arguments—those that . . . 'go for the jugular.'" *Id.* at 753 (citations omitted). To be

effective, therefore, appellate counsel may select among competing non-frivolous arguments in order to maximize the likelihood of success on appeal." *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing *Jones*, 463 U.S. 745). Indeed, the practice of "winnowing out" weaker arguments on appeal, so to focus on those that are more likely to prevail, is the "hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones*, 463 U.S. at 751-52). In considering the reasonableness of an appellate attorney's decision not to raise a particular claim, therefore, this Court must consider "all the circumstances, applying a heavy measure of deference to counsel's judgments." *Eagle v. Linahan*, 279 F.3d 926, 940 (11th Cir. 2001) (quoting, *Strickland,* 466 U.S. at 691).

In the context of an ineffective assistance of appellate counsel claim, "prejudice" refers to the reasonable probability that the outcome of the appeal would have been different. *Eagle*, 279 F.3d at 943; *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990) (citations omitted). Thus, in determining whether the failure to raise a claim on appeal resulted in prejudice, the courts must review the merits of the omitted claim and, only if it concludes that the claim would have had a reasonable probability of success, then counsel's performance will be deemed prejudicial because it affected the outcome of the appeal. *Eagle*, 279 F.3d at 943 (citing *Cross*, 893 F.2d at 1290).

IV. DISCUSSION

In **claim 1**, movant contends that appellate counsel was ineffective for failing to argue on appeal that the government used "judicial bias" by introducing a year-old check from movant's corporate account. Movant contends this evidence had "no legal basis regarding his guilt or innocenc[e]" and prejudiced the jury. (ECF No. 1:9).

As noted, the government's main witness, Freddy Howard, testified that in 2013, before he was working with the FBI, movant gave him a handwritten list of personal identifying information for six or seven individuals. (Cr. ECF No. 81:67-68). Howard used that information to file fraudulent tax returns for these individuals without their knowledge. (*Id.*:68). The IRS issued a $70,000 refund check on one of those returns, and mailed it to Howard's associate's (Joseph Exantus) address. (*Id.*:69-71). Howard told movant about the check, but movant indicated that he had no way of cashing it because it was in someone else's name. (*Id.*). Instead, Exantus paid movant with a check for $10,000. (*Id.*:72).

Before trial, the government filed a notice that it intended to introduce testimony from Howard regarding his dealings with movant, including movant's receipt of the $10,000 check; the government argued that this evidence provided "context, motive and modus operandi" for the crimes at issue. (Cr. ECF No. 25:1-2). When the government moved to admit the $10,000 check into evidence at trial, movant's counsel objected on relevance grounds, asserting that the government did not have any evidence to establish the purpose of the check. (Cr. ECF No. 81:71-72). The Court overruled the objection and admitted the check into evidence. (*Id.*).

Under Fed. R. Evid. 404(b), evidence of other crimes may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). On a defendant's request, the prosecutor must "provide reasonable notice of the general nature of such evidence that the prosecutor intends to offer at trial." Fed. R. Evid. 404(b)(2)(A)-(B).

Here, the government gave the defense early notice of its intent to introduce evidence of the pattern of fraudulent conduct between Howard and movant, to include the $10,000 check, to prove movant's modus operandi and provide context for his later dealings with Howard. (Cr. ECF No. 25). Such evidence is admissible pursuant to Rule 404(b). Fed. R. Evid. 404(b)(2); s*ee also United States v. Muscatell*, 42 F.3d 627, 630-31 (11th Cir. 1995). In *Muscatell*, the defendants, who were charged with mortgage fraud, argued that evidence of their participation in other "land flip schemes" was inadmissible because it constituted extrinsic bad act evidence. *Muscatell*, 42 F.3d at 630. The Court of Appeals ruled that the evidence was admissible because it constituted evidence of the defendants' intentional scheme to defraud, and as such, was intrinsic to the crimes charged. *Id.* at 631.

Here, evidence of movant's previous participation with Howard in a tax fraud scheme, to include his receipt of $10,000 from a fraudulent tax refund, was probative of his later motive when he sold Howard personal identifying information. It was not error for the Court to admit this evidence and counsel cannot be faulted for failing to raise this nonmeritorious issue on appeal. *See Card v. Dugger,* 911 F.2d 1494, 1520 (11th Cir. 1990) (citations omitted). Claim 1 should be denied.

In **claim 2**, movant alleges that appellate counsel should have argued on appeal that trial counsel was ineffective for failing to move to suppress his handwritten confession. (ECF No. 1:9). Specifically, movant claims that this written statement was false and that he later recanted it after the government failed to present the "audio or any recording or witnesses" to support this fabricated confession. (*Id.*). In his reply brief, movant further

claims that Agent Lawler wrote the confession without movant's consent. (ECF No. 19:4-5).

FBI Agent Lawler testified that movant waived his *Miranda* rights and told Lawler that he knew that Howard had a tax business and he assumed that the personal identifying information was going to be used to file taxes through his office fraudulently. (Cr. ECF No. 80:188-89). Lawler also testified that movant made a written confession, wherein he stated: "I sold Freddy Howard records. I knew he did taxes, and I assumed he was using them to file through his office." (*Id.*:190-191). The statement was admitted into evidence without objection. (*Id.*:190). On cross-examination, counsel did, however, extensively cross-examine Lawler regarding the veracity of the confession and was able to impeach Lawler on his claim that the identities that movant sold were "stolen." (Cr. ECF No. 81:30-37).

There is nothing in the record that suggests movant's post-*Miranda* admissions were fabricated. Lawler clearly testified that movant waived his *Miranda* rights and agreed to speak with him regarding the crimes at issue. Movant does not identify evidence that his *Miranda* waiver was falsified or that Lawler obtained his statements in violation of the Sixth Amendment. As such, his confession, which was lawfully obtained, was admissible at trial, and counsel had no basis for a motion to suppress those statements. *See Huckelbury v. Wainwright*, 781 F.2d 1544, 1545 (11th Cir. 1986).

As for movant's complaint that there was no audio or video recording to confirm his statements to Lawler, such evidence is not required under the Federal Rules of Evidence. Instead, the absence of audio or video recordings is relevant to the credibility,

rather than admissibility, of this evidence. *See United States v. Miller*, 664 F.2d 826, 828 (11th Cir. 1981) ("Credibility determinations are the province of the jury, not of th[e] Court." (citation omitted)). Here, although counsel vigorously cross-examined Lawler about the confession, the jury was clearly unpersuaded as it found movant guilty of all but one of the crimes charged in the Indictment.

Finally, appellate counsel cannot be deemed ineffective for failing to raise a claim of ineffective assistance of counsel on direct appeal, as such claims cannot be asserted on direct appeal unless there has been an opportunity to develop the claim on the record before the trial court. *See United States v. Griffin*, 699 F.2d 1102, 1107 (11th Cir. 1983); *see also United States v. Stephens*, 609 F.2d 230, 234 (5th Cir. 1980). From this record, it does not appear that movant raised the claim regarding trial counsel's ineffectiveness at any point before or during the District Court proceedings. As such, appellate counsel cannot be deemed ineffective for failing to raise this issue on appeal. Accordingly, movant fails to demonstrate that counsel's performance was deficient under *Strickland* and claim 2 should be denied.[4]

In **claim 3**, movant argues that appellate counsel was ineffective for failing to demand the tapes and transcripts of recorded conversations between movant and Howard. (ECF No. 1:10). Movant claims that these records were crucial to his defense because they included exculpatory evidence. (*Id.*). Specifically, movant claims that he told Howard, in

[4] To the extent that movant appears to later argue, (ECF No. 19:5), that the District Court erred by failing to comply with 18 U.S.C. § 3501, which requires courts to determine the voluntariness of a confession, this claim is without merit because the Supreme Court held, in *Dickerson v. United States*, 530 U.S. 428, 431-32 (2000), that 18 U.S.C. § 3501 is unconstitutional.

a recorded phone call, that if he found out that Howard was doing anything illegal with the information that movant provided him, that he would discontinue all business ties with Howard and would contact the authorities. (*Id.*).

To establish that the government's failure to disclose material exculpatory evidence violates movant's right to due process, he must show that that evidence was (1) suppressed, (2) favorable to the defense, and (3) material either to guilt or punishment. *East v. Johnson*, 123 F.3d 235, 237 (5th Cir. 1997) (citation omitted); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Undisclosed evidence is material if there exists a reasonable probability that the result of the proceedings would have been different had the evidence been disclosed to the defense. *See East*, 123 F.3d at 237 (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Movant's claim is purely speculative. He does not identify when he allegedly made this exculpatory statement. He provides this Court with no support for his bald allegations, to indicate that he made such a statement. Such bare and conclusory allegations are insufficient to satisfy the *Strickland* test. *See Boyd v. Comm, Ala. Dep't of Corr.*, 697 F.3d 1320, 1333–34 (11th Cir. 2012).

Moreover, review of the record reveals that trial counsel extensively cross-examined Lawler on the fact that certain recordings, notably sessions 1 and 7, were missing from government's exhibit 2B, which included the February 11, 2014 conversations between Howard and movant. (Cr. ECF No. 81:11-13). Lawler explained that the transcripts from session 1 pertained to a matter unrelated to this case, and that session 7 was merely a test session to make sure that the recording device was working. (*Id.*:11,13). Lawler had similar

explanations for "missing" conversations from other dates. (*Id.*:14-28). On re-direct, Lawler explained that there were no conversations that were not included in the original government exhibits, and that the only calls left off were those that were made for testing purposes or when a call was unanswered. (*Id.*:41). The government then played the "missing" phone calls for the jury to hear. (Id.:38-45). Thus, it appears, contrary to movant's allegations here, that all of his recorded phone calls with Howard were played at trial.

Given the foregoing, movant's allegation that the government failed to disclose his alleged exculpatory statement to the jury appears unsupported. Accordingly, appellate counsel cannot be faulted for failing to raise this frivolous issue on appeal. *See Smith v. Robbins*, 528 U.S. at 288. Claim 3 should be denied.

In **claim 4**, movant alleges that his trial counsel was ineffective when he refused to call his boss, fellow employees, and numerous other clients to verify that movant legally brokered personal identities as part of his business. (ECF No. 1:11). In related **claim 5**, movant argues that appellate counsel was ineffective for failing to raise this issue of ineffective assistance on direct appeal. (*Id.*).

"[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *Buckelew v. United States,* 575 F.2d 515, 521 (5th Cir. 1978). Indeed, "[w]hich witnesses, if any, to call, and when to call them, is the epitome of a strategic decision and it is one that [the courts] will seldom, if ever, second guess." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (citation omitted). Trial

counsel is not ineffective in failing to call witnesses whose testimony would largely be cumulative of evidence the jury did hear. *See Johnston v. Singletary*, 162 F.3d 630, 639 (11th Cir. 1998).

Moreover, "evidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or on affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991) (footnotes omitted). In other words, to successfully assert that trial counsel should have called a witness, a petitioner must first make a sufficient factual showing substantiating the proposed witness testimony. *United States v. Schaflander*, 743 F.2d 714, 721 (9th Cir. 1984).

These two claims fail for multiple reasons. First, movant fails to provide any witness affidavits or other proof that these purported witnesses would have testified that he legally brokered personal identities as part of his business. Simply stating that the testimony of these witnesses would have helped him at trial is not enough to sustain an ineffective assistance of counsel claim under *Strickland*. *See Ashimi*, 932 F.2d at 650. Movant's claim is entirely speculative and fails on this basis alone. *See Boyd*, 697 F.3d at 1333–34.

Second, prior to trial, the government filed a notice of its intent to call movant's former boss, Michael Francis, as a witness. (Cr. ECF No. 25:2). The government proffered that Francis would testify that he fired movant because he misappropriated Global Matrix Leads customers and caused them to send money directly to bank accounts controlled by movant. (*Id.*). The government sought to admit this testimony under Fed. R. Evid. 404(b)

as evidence of movant's fraudulent intent. (*Id.*). Ultimately, the government did not call Michael Francis as a witness. On this record it appears trial counsel made a strategic decision to not call Francis as a defense witness because his testimony would have been damaging to movant. This Court must not second-guess matters of reasonable trial strategy. *Waters v. Thomas*, 46 F.3d at 1512 (citation omitted).

Moreover, even if these witnesses, including Francis, would have testified as to movant's participation in legitimate business transactions, there is no indication that they had personal knowledge of the transactions between Howard and movant which were the subject of movant's prosecution. On this record, there is no reason to believe that their purported testimony would have led to movant's acquittal. Thus, even if trial counsel's performance could be deemed deficient for failing to call these alleged witnesses, petitioner has not shown that this caused him prejudice.

In sum, movant cannot meet either prong of *Strickland*, and his argument that trial counsel was ineffective (claim 4) is without merit. Similarly, movant cannot demonstrate ineffective assistance of appellate counsel (claim 5) because: (1) he fails to demonstrate that the outcome on appeal would have been different had counsel raised this nonmeritorious issue, and (2) matters of ineffective assistance of trial counsel, as previously discussed, cannot generally be raised on direct appeal. *See Griffin*, 699 F.2d at 1107 (citations omitted). As such, claims 4 and 5 should be denied.

In **claim 6**, movant alleges that appellate counsel was ineffective for failing to argue on appeal that the District Court abused its discretion by refusing to adequately answer a jury question during deliberations. (ECF No. 1:12). More specifically, movant claims that

after the jury submitted a question to the Judge, asking whether it was lawful for marketers to sell identities, the Court inadequately responded, thereby prejudicing him. (*Id.*).

The jury's question read: "Under any circumstance, is a Social Security number allowed to be sold? Is any legal leads business allowed to sell a Social Security number?" (Cr. ECF No. 82:59). Defense counsel asked that the Court respond "yes" because there was testimony in the record to support such an answer. (*Id.* at 59-60). The government, on the other hand, requested that the jurors be directed to rely on the evidence and the jury instructions. (*Id.* at 59). The Court concluded that because there was testimony in the record to support the fact that social security numbers are allowed to be sold, the best response was to instruct the jurors to rely on the evidence presented during trial. (*Id.*:60).

The District Court has wide discretion regarding the submission of supplemental instructions to the jury. *United States v. Frederick*, 608 F. App'x 744, 746 (11th Cir. 2015) (citing *United States v. Lopez*, 590 F.3d 1238, 1247 (11th Cir. 2009)). When declining to give the jury supplemental instructions in response to a jury question, a district court "does not abuse its discretion by instructing the jury to rely on its collective memory when the court attempts to reconcile the conflicting interests of several parties when answering a question." *Id.* (citing *United States v. Delgado*, 56 F.3d 1357, 1370 (11th Cir. 1995)). To show abuse of discretion, the defendant must show that the district court's answer to a jury question prejudiced him. *Id.* (citing *United States v. Pacchioli*, 718 F.3d 1294, 1306 (11th Cir. 2013)).

Here, the Court considered the arguments from both parties and concluded that a simple instruction that the jury rely on the evidence presented at trial was the best response

to the jury's question. In doing so, the Court did not misstate the law or confuse the jury. Appellate counsel cannot be faulted for failing to raise this nonmeritorious issue on direct appeal. Claim 6 should be denied.

In **claim 7**, movant alleges that appellate counsel was ineffective for failing to argue that the District Court misapplied the intended loss enhancement when there was no actual foreseeable loss. (ECF No. 1:13). Because there was no actual monetary loss in this case, movant further asserts that the District Court's enhancement of his sentence based on the intended loss amount constitutes a miscarriage of justice. (*Id.*).

Section 2B1.1 of the 2014 Guidelines, which were in effect at the time of movant's initial sentencing, provides for an 18-level increase for a fraud offense involving a loss between $2,500,000 and $7,000,000. U.S. Sentencing Guidelines Manual § 2B1.1(b)(1)(J) (U.S. Sentencing Comm'n 2014). The total loss amount is the "greater of [the] 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 there was no actual loss. *See United States v. Menichino*, 989 F.2d 438, 442 (11th Cir. 1993). Furthermore, pursuant to the applications notes to U.S.S.G. § 2B1.1, a loss pertaining to an unauthorized access device includes any unauthorized charges made with the device and *shall not be less* than $500 per device. U.S.S.G. § 2B1.1 cmt. n.3(F)(i).

Here, the PSI noted an 18-level increase, to account for movant's intended loss of $2,614,000. (PSI ¶ 20). Trial counsel objected to this loss calculation arguing that the

government, through Howard, asked movant to provide identifying information for an exorbitant number of individuals, and thus manipulated the intended loss figure and the sentence. (Cr. ECF No. 64:3-4). Movant's counsel contended that the proper loss amount should reflect the identifying information for the 1,100 individuals that movant had sent Mr. Howard before to the FBI began its investigation. (*Id.*:4). The Court justifiably overruled the objection at sentencing. (Cr. ECF No. 78:5).

At trial, the government established that movant possessed identifying information, including the social security numbers, for 5,228 individuals. In finding movant guilty of the use of unauthorized access devices, the jury necessarily found that he acted with the intent to defraud these individuals. (Cr. ECF No. 51:8). The Guidelines required that a minimum $500 loss amount per access device be applied, pursuant to U.S.S.G. § 2B1.1 cmt. n.3(F)(i),[5] which here amounts to an intended loss at $2,614,000. (PSI ¶¶ 12, 20). This method of calculating loss in fraud cases involving the use social security numbers as unauthorized access devices is permissible, and as such, it was not error for appellate counsel to decline to raise this issue on appeal. *See United States v. Wright*, 862 F.3d 1265, 1274-76 (11th Cir. 2017).

[5] Movant appears to suggest in his reply that the $500 minimum per device does not apply because the unauthorized access devices were never used. (ECF No. 19:14). Specifically, he relies on the Eleventh Circuit's holding in *United States v. Bermudez*, 536 F. App'x 869, 871 (11th Cir. 2013), wherein the Court found that the $500 minimum per device did not apply in a counterfeit credit card case because the amount charged to the credit cards was **more than $500** per card. *Id.* This case is different from *Bermudez* because here, no charges were made using the access devices and this squarely falls within the language of U.S.S.G. § 2B1.1 cmt. n.3(F)(i) which explicitly states that the "loss [amount]...**shall not be less than $500** per access device."

In his reply memorandum, movant further contends that the loss amount enhancement should not have been applied because Application Note 2 to § 2B1.6 explains that when sentencing a defendant to a mandatory two-year consecutive sentence pursuant to 18 U.S.C. § 1028A in conjunction with a sentence for an underlying offense, specific offense characteristics for the transfer, possession, or use of a means of identification should not be applied. (ECF No. 19:15). This is so because the mandatory consecutive two-year sentence under § 1028A accounts for these factors regarding the underlying offense of conviction. (*Id.*).

Here, although movant was sentenced to a mandatory two-year consecutive sentence for aggravated identity theft, Application Note 2 to § 2B1.6 does not apply because an enhancement for loss amount does not pertain to an offense characteristic related to the "transfer, possession, or use of a means of identification." *U.S. v. Ford*, 784 F.3d 1386, 1397 (11th Cir. 2015) (upholding enhancement for the number of victims because it is not an offense characteristic related to the "transfer, possession, or use of a means of identification"); *see also United States v. Williams*, 605 F. App'x 878, 882 (11th Cir. 2015)(§ 2B1.6 cmt. n.2 does not bar application of an enhancement for loss amount); *United States v. Lyles*, 506 F. App'x 440, 447 (6th Cir. 2012).

Given the foregoing, appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue on direct appeal. Claim 7 should be denied.

In **claim 8**, movant claims that trial counsel was ineffective for failing to object to the District Court's misapplication of the abuse-of-trust enhancement by failing to argue that the enhancement requires a "victim." (ECF No. 1:13). Movant may also be claiming

that appellate counsel was ineffective for failing to challenge the District Court's misapplication of the abuse-of-trust enhancement on direct appeal. (*Id.*). Although movant is not clear, in an abundance of caution the Court addresses both the possibility of ineffective trial and appellate counsel.

The PSI originally applied the abuse-of-trust enhancement, pursuant to U.S.S.G. § 3B1.3, because movant obtained the personal identifying information during the course of his daily employment as a business leads "generator" for medical suppliers. (PSI ¶¶ 10, 23). Counsel objected and argued that the enhancement did not apply because there was no fiduciary relationship between movant and the victims. (Cr. ECF No. 64 at 5-6). The District Court overruled the objection at sentencing and said the following:

> By nature of what the defendant did for a living, he had access to all this information and I find that it's clearly an abuse of trust. And then to turn around and use this very personal information and sell it for a profit in a way certainly not contemplated by any of the people that entrusted that information to the defendant and his employer. So that objection will be overruled.

(Cr. ECF No. 78:6).

The sentencing guidelines provide for a two-level enhancement when a defendant "abused a position of public or private trust...in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. Application Note 1 to § 3B1.3 explains that a "position of public or private trust" is "characterized by professional or managerial discretion." U.S.S.G. § 3B1.3, ctm. n.1. However, *"[n]otwithstanding Application Note 1, or any other provision of this guideline," if a defendant "exceeds or abuses the authority or his or her position in order to obtain,*

transfer, or issue unlawfully, or use without authority, any means of identification," the abuse-of trust enhancement is applicable. U.S.S.G. § 3B1.3 cmt. n.2(B). Specific examples of conduct that fall under § 3B1.3 cmt. n.2(B) include (i) an employee of a state motor vehicle department who knowingly issues a driver's license based on false information, (ii) a hospital orderly who misuses patient information from a patient chart, and (iii) a charitable organization volunteer who obtains or misuses information from a donor's file. *Id.*

In *United States v. Williams*, the Eleventh Circuit found that the abuse-of-trust enhancement was properly applied where the defendant prepared fraudulent tax returns using the personal identification information his tax clients provided him. *Williams,* 605 F. App'x at 881. The government, in relying on *Williams*, argues that the enhancement was properly applied because movant abused his access to the personal identifying information by selling it to Howard. (ECF No. 13:16-17). Movant does not disagree but seeks to distinguish his case on the basis that he, unlike the defendant in *Williams*, did not have a fiduciary relationship with the "victims." (ECF No. 19:16-17). Movant goes further, claiming that the fraud victims were not victims because they did not suffer an actual loss. (*Id.*:17-18).

Here, movant had access to the personal identifying information of thousands of individuals through his job as a leads generator in the marketing business. As discussed above, the plain language of § 3B1.3 cmt. n.2(B), which only requires that the defendant *exceeded or abused his position or authority in order to obtain or unlawfully use means of identification without authority*, does not require that there be any actual loss to any victims

in order for the enhancement to apply. Counsel was not ineffective for failing to raise an objection to the abuse-of-trust enhancement on this basis.

Moreover, the existence of a fiduciary relationship between movant and the individuals on the lists was not required for application of the abuse-of-trust enhancement. *See United States v. Cruz*, 713 F.3d 600 (11th Cir. 2013) (citing *United States v. Abdeshafi*, 592 F.3d 602,611 (4th Cir. 2010) for the proposition that if movant's conduct falls under the plain reading of § 3B1.1 cmt. n.2(B), the Court need not reach the issue of whether there was a fiduciary relationship)).

Given the foregoing, the District Court did not improperly apply the abuse-of-trust enhancement at sentencing. Because any challenge to the enhancement would have been without merit, movant fails to demonstrate that trial or appellate counsel's performance was deficient under *Strickland.* Accordingly, claim 8 should be denied.

In **claim 9**, movant appears to allege that he received ineffective assistance of appellate counsel for failing to challenge his unlawful resentencing above the recommended guideline range, after the Court considered "inadmissible factors". (ECF No. 1:14). Movant does not articulate to the nature of these "inadmissible" factors, but he appears to argue in his reply that he received ineffective assistance of counsel where his lawyer failed to argue that the Court improperly considered the identities as "stolen." (ECF No. 19:19). This claim is essentially the same as **claim 10**, wherein movant alleges that trial counsel was ineffective for failing to challenge the Court's resentencing him outside the guideline range while relying on false evidence that movant stole the identities of

thousands of victims. (ECF No. 1:14). The Court therefore addresses claims 9 and 10 together.

At re-sentencing, although the revised recommended guideline range was 92 to 115 months, the Court chose to impose the original 130-month sentence. (Cr. ECF No. 109:12-13). The Court offered a number of reasons for that sentence, including that movant's crimes "involved thousands of victims and their stolen identifications." (*Id.*:12). Movant challenged that sentence on direct appeal. *See United States v. Siler*, 671 F. App'x 739 (11th Cir. 2016). He argued that his sentence was procedurally unreasonable because the District Court based his 130-month upward variance on its erroneous statement that the offense involved "thousands of victims and their stolen identifications." *Id.* at 740 (internal quotations omitted). The Eleventh Circuit affirmed movant's sentence, and also noted the following regarding the reasonableness of his sentence:

> In formulating the appropriate sentence, the court acknowledged the correctly calculated guideline range and considered arguments from both parties as well as Siler's allocution. In addition, the court articulated specific § 3553(a) factors in justifying the upward variance. The court's statement concerning "victims and their stolen identifications" injected no error into the decision-making process. The language may be subject to multiple interpretations and is not clearly erroneous considering the offenses for which Siler convicted. In addition, the record demonstrates that the court did not assign the comment in question great weight. Accordingly, we affirm the sentence as reasonable.

Siler, 671 F. App'x at 741.

The Eleventh Circuit was clear that the trial court's reference to "thousands of victims and their stolen identifications" injected no error into the sentencing process, and that the trial court did not assign great weight to its comment. There is nothing to suggest

that had trial counsel objected to this comment, that it would have changed the outcome of the resentencing. Plus, movant's appellate counsel did raise this complaint on appeal, without success. Accordingly, claims 9 and 10 should be denied.

In **claim 12**, which movant raised in his supplemental complaint (ECF No. 11), he contends that he received ineffective assistance of counsel where his lawyer failed to object to the prosecutor's statements during closing argument. (*Id.*:1). Specifically, movant argues that the prosecutor: (1) improperly referred to the $70,000 IRS check when it was never submitted into evidence (*Id.*:3), and (2) falsely argued that movant admitted to having an intent to defraud (*Id.*:3-4). Thus, movant appears to raise a claim of prosecutorial misconduct. (*Id.*:2).

The standard for federal habeas corpus review of a claim of prosecutorial misconduct is whether the alleged actions rendered the entire trial fundamentally unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-45 (1974); *Hall v. Wainwright*, 733 F.2d 766, 733 (11th Cir. 1984). In assessing whether the fundamental fairness of the trial has been compromised, the totality of the circumstances are to be considered in the context of the entire trial, *Hance v. Zant*, 696 F.2d 940 (11th Cir. 1983); and "[s]uch a determination depends on whether there is a reasonable probability that, in the absence of the improper remarks, the outcome of the trial would have been different." *Williams v. Weldon*, 826 F.2d 1018, 1023 (11th Cir. 1988).

As noted earlier, Freddy Howard testified that in 2013, prior to the crimes charged in the Indictment, movant gave him a handwritten list of identifying information for six or seven individuals. Howard gave that list to his associate, Joseph Exantus, and directed him

to file fraudulent tax returns under those names. The IRS issued an approximately $70,000 refund check to one of the individuals on the list provided by movant. Howard testified that because movant did not have a way to cash the check issued under someone else's name, Exantus cut him a $10,000 check in exchange for the rights to the $70,000 check. The $10,000 check was entered into evidence. Therefore, although the $70,000 check itself never came into evidence, there was ample testimony in the record to support the government's statements regarding the existence of the check. The government's reliance on this testimony during closing argument was not improper.

Movant's argument that the prosecutor improperly referenced movant's intent to defraud, in his closing argument, is also without merit. During closing argument, the prosecutor replayed a recording wherein movant told Howard that he has a "couple legitimate cases too." (Cr. ECF No. 82:12). The prosecutor argued that movant was insinuating that he was committing fraud in other cases *e.g.* the cases at issue in the trial. Such reasonable inferences are permissible during closing argument. *See United States v. Young*, 685 F. App'x 832, 835 (11th Cir. 2017) (citing *United States v. Bailey*, 123 F.3d 381, 1400 (11th Cir. 1997). Trial counsel cannot be faulted for failing to make a meritless objection to this statement. Claim 12 should be denied.

Finally, in **claim 11**, movant argues that counsel was ineffective for failing to argue on appeal that cumulative errors committed by trial counsel deprived him of his constitutional right to representation. (ECF No. 1:16). When viewing the evidence in this case in its entirety, the alleged errors, neither individually nor cumulatively, infused the proceedings with unfairness as to deny movant a fundamentally trial and due process of

law. Movant therefore is not entitled to habeas corpus relief. *See United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (stating that "a cumulative-error analysis aggregates only actual errors to determine their cumulative effect."). Contrary to movant's assertions here, the result of the proceedings were not fundamentally unfair or unreliable. *See Lockhart*, 506 U.S. at 369-70. Accordingly, claim 11 should be denied.

V. EVIDENTIARY HEARING

Movant is not entitled to an evidentiary hearing, as he has not demonstrated that his allegations, if proved, would establish his right to collateral relief. *See Schriro,* 550 U.S. at 473-75; *Holmes v. United States,* 876 F.2d 1545, 1553 (11th Cir. 1989).

VI. CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, and to do so, must obtain a certificate of appealability ("COA"). *See* 28 U.S.C. '2253(c)(1); *Harbison v. Bell,* 556 U.S. 180, 129 S.Ct. 1481 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural

ruling." *Id.* This record does not support this Court issuing a certificate of appealability. If petitioner does not agree, he may address this in his objections to this Report and Recommendation.

VII. RECOMMENDATIONS

Based on the foregoing, I respectfully recommend that the Court DENY Richard Siler's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (ECF No. 1).

VIII. OBJECTIONS

Objections to this Report may be filed with the District Judge within fourteen days of receipt of a copy of the Report. Failure to file timely objections shall bar Plaintiff from a *de novo* determination by the District Judge of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the District Judge except upon grounds of plain error or manifest injustice. *See* 28 U.S.C. § 636(b)(1); *Henley v. Johnson*, 885 F.2d 790,794 (1989); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988).

RESPECTFULLY RECOMMENDED in chambers in Miami, Florida this 8th day of May, 2019.

Chris McAliley

CHRIS MCALILEY
UNITED STATES MAGISTRATE JUDGE

Cc: The Honorable Darrin P. Gayles
Counsel of record
Richard Anthony Siler
02154-104

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-cv-24294-GAYLES/MCALILEY
CASE NO. 14-cr-20116-GAYLES

RICHARD ANTHONY SILER,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER AFFIRMING AND ADOPTING REPORT OF MAGISTRATE JUDGE

THIS CAUSE comes before the Court on the Report of Magistrate Judge (the "Report") [ECF No. 29]. Movant Richard Anthony Siler filed a pro se writ of habeas corpus pursuant to 28 U.S.C. § 2255 challenging the constitutionality of his conviction and sentence entered pursuant to his guilty plea in Case No. 14-cr-20116-GAYLES in the United States District Court for the Southern District of Florida (the "Motion") [ECF Nos. 3, 28]. The matter was referred to Magistrate Judge Chris McAliley, pursuant to 28 U.S.C. § 636(b)(1)(B) and Administrative Order 2003-19 of this Court, for a ruling on all pretrial, non-dispositive matters, and for a Report and Recommendation on any dispositive matters. [ECF Nos. 2, 28]. In her Report, Judge McAliley recommended that the Court deny the Motion because Movant has not presented a plausible claim that his trial and appellate counsel were ineffective, in violation of his Sixth Amendment right to counsel. [*See generally* ECF No. 29]. Judge McAliley also recommended that an evidentiary hearing be denied because Movant cannot establish that his allegations would establish his right to collateral relief. [*Id.* at 33]. Finally, Judge McAliley recommended that no certificate of appealability issue. [*Id.* at 33–34]. Movant timely objected to the Report [ECF No. 32]. The United States did not file a response.

A district court may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1). Those portions of the report and recommendation to which objection is made are accorded *de novo* review, if those objections "pinpoint the specific findings that the party disagrees with." *United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009); *see also* Fed. R. Civ. P. 72(b)(3). Any portions of the report and recommendation to which *no* specific objection is made are reviewed only for clear error. *Liberty Am. Ins. Grp., Inc. v. WestPoint Underwriters, L.L.C.*, 199 F. Supp. 2d 1271, 1276 (M.D. Fla. 2001); *accord Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006).

This Court, having conducted a *de novo* review of the record, agrees with Judge McAliley's well-reasoned analysis and recommendation and agrees that the Motion must be denied on the merits.

Accordingly, after careful consideration, it is **ORDERED AND ADJUDGED** as follows:

(1) Judge McAliley's Report of Magistrate Judge [ECF No. 29] is **AFFIRMED AND ADOPTED** and incorporated into this Order by reference;

(2) The Motion is **DENIED**;

(3) No certificate of appealability shall issue;

(4) This action is **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 29th day of June, 2019.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE