Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-14260-C

CARLOS FLEITAS,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

ORDER:

Carlos Fleitas, a federal prisoner, moves this Court for a certificate of appealability ("COA") so that he may the denial of his 28 U.S.C. § 2255 motion and for leave to proceed *in forma pauperis* on appeal. Because reasonable jurists would not debate the district court's denial of his claims of ineffective assistance of counsel and cumulative error, his motion for a COA is DENIED and his motion to proceed *in forma pauperis* is DENIED as moot.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 1:20-CV-22362-ROSENBERG/MAYNARD,
1:17-CR-20322-ROSENBERG/O'SULLIVAN

CARLOS FLEITAS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 AND CLOSING CASE

Movant Carlos Fleitas ("Movant") is a federal prisoner serving a 150-month sentence after pleading guilty to fraud and identity-theft crimes. He has filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 ("Motion"), arguing that he received ineffective assistance of counsel during his sentencing hearing. DE-CV 1; DE-CR 170.[1] The Court has carefully considered the Motion, the Movant's Memorandum [DE-CV 3-1], the Government's Response [DE-CV 8], the Movant's Reply [DE-CV 9], and the record and is otherwise fully advised in the premises. As discussed below, because the Movant has not shown that his counsel performed ineffectively or that he was prejudiced, the Motion is **DENIED**.

I. BACKGROUND

A federal grand jury indicted the Movant for conspiracy to commit access device fraud, in violation of 18 U.S.C. § 1029(b)(2) (Count 1); possession of access device making equipment, in

[1] DE-CV refers to docket entries in Case No. 1:20-cv-22362. DE-CR refers to docket entries in Case No. 1:17-cr-20322.

violation of 18 U.S.C. § 1029(a)(4) (Counts 2 and 5); and aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1) (Counts 3 and 4). DE-CR 28. The Movant pled guilty to Counts 1, 2, and 3. DE-CR 54, 61, 62. He admitted to participating in a conspiracy in which he and his co-defendants surreptitiously installed credit card skimming devices in fuel pumps at gasoline stations to obtain the credit card numbers of people who swiped their credit cards at the pumps. DE-CR 62.

The United States Probation Office prepared a presentence investigation report ("PSI") in anticipation of sentencing. According to the PSI, the Movant was responsible for a total loss amount of $1,872,500. DE-CR 79 ¶ 32. This loss amount was calculated by multiplying 3,745 by $500. *Id.* The number 3,745 was used because the PSI reported that the Movant was responsible for 3,745 stolen credit card numbers, consisting of 3,659 numbers found on a laptop seized from a co-defendant's residence and 86 numbers found at the Movant's residence. *Id.* ¶ 22. The PSI calculated that the Movant's guideline range for Counts 1 and 2 was 70 to 87 months and that Count 3 carried a mandatory consecutive 24-month term of imprisonment. *Id.* ¶¶ 87, 89.

The Movant's counsel objected to the conclusion in the PSI that the Movant was responsible for 3,745 credit card numbers, arguing that the numbers found on the seized laptop should not be attributed to the Movant or included as relevant conduct under U.S.S.G. § 1B1.3. DE-CR 87. The Movant's counsel also joined the co-defendants' objections, including objections that a loss of $500 per credit card number was unreasonable and unjust, that a loss amount of $1,872,500 was not an accurate calculation of the damages, and that there was no evidence that each credit card number at issue was a valid and usable number. DE-CR 74, 76, 87. During the sentencing hearing, the Movant's counsel added that the co-defendant with the laptop had been "involved in at least one other conspiracy case," and thus it was unclear how the Court could

"parcel out what he was involved with in that offense as opposed to the criminal conduct that was entered into and agreed to in this case." DE-CV 8-1 at 3.

Miami-Dade Police Department Detective and United States Secret Service Task Force Officer Sebastian Monros testified during the sentencing hearing. *Id.* at 5-6. Detective Monros testified that he had investigated "[e]asily over a hundred cases" of credit card fraud during his career, had "examined over a hundred thousand files of credit card data," and was familiar with credit card skimming devices. *Id.* at 6. He had conducted surveillance of the Movant and his co-defendants and had observed them using a laptop while installing and removing skimming devices in fuel pumps. *Id.* at 6-7. Detective Monros seized a laptop from a co-defendant's residence while executing a search warrant and discovered over 3,000 credit card numbers on the laptop that were formatted in such a way as to be consistent with having been obtained from a skimming device. *Id.* at 7-8. Detective Monros testified that a skimming device can hold a minimum of around 2,000 credit card numbers and that the Movant had the equipment to make skimming devices. *Id.* at 8, 13. On cross-examination, Detective Monros testified that the skimming devices that law enforcement recovered from gasoline stations that he saw Movant visit held approximately 160 credit card numbers. *Id.* at 10-12. These 160 numbers were not included in the numbers on the seized laptop because law enforcement recovered the skimming devices before the Movant or his co-defendants returned to the gasoline stations to collect them. *Id.* at 12-14. Detective Monros testified that he did not know when the credit card numbers on the laptop had been downloaded; he further testified that the Movant had been skimming credit card numbers "for years" and was on bond for similar conduct. *Id.* at 15-18.

Following Detective Monros's testimony, the Court determined that the PSI reflected the correct total loss amount and guideline range. *Id.* at 24. The Court varied upward and imposed a

150-month sentence, consisting of 60 months for Count 1 concurrent with 120 months for Count 2, a consecutive 24-month term for Count 3, and a consecutive 6-month term under 18 U.S.C. § 3147 because the Movant committed an offense while on release. *Id.* at 27-29; DE-CR 94.

The Movant appealed his sentence and challenged the loss calculation, the guideline calculation, and the substantive reasonableness of his sentence. The Eleventh Circuit Court of Appeals affirmed. *See United States v. Fleitas*, 766 Fed. App'x 805 (11th Cir. 2019). The Movant then filed the Motion that is presently before this Court, raising claims of ineffective assistance of counsel. The Government does not contend that the Motion was untimely filed or that the Movant's claims are otherwise procedurally barred.

II. APPLICABLE LAW

A criminal defendant raising an ineffective-assistance-of-counsel claim must show (1) that counsel's performance was deficient in that it fell below the objective standard of competence demanded of attorneys in criminal cases, and (2) that the deficient performance caused prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). In evaluating an ineffective-assistance claim, a court's "scrutiny of counsel's performance must be highly deferential." *Id.* at 689. A "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689-90. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Prejudice is shown where "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 a probability sufficient to undermine confidence in the outcome." *Id.*

III. ANALYSIS

A. Claim 1: Detective Monros

The Movant's first claim is that his counsel rendered ineffective assistance by failing to object to Detective Monros testifying as an expert without being qualified at the sentencing hearing. The Movant argues that Detective Monros was unqualified to testify about credit card skimming devices, the skimming process, and the manner in which skimmed credit card numbers are downloaded.

As an initial matter, to the extent that the Movant contends that Detective Monros did not satisfy the requirements under Fed. R. Evid. 702 to testify as an expert, the Federal Rules of Evidence do not apply during a sentencing hearing. Fed. R. Evid. 1101(d)(3). During sentencing, a court may consider evidence regardless of whether it would be admissible at trial if "(1) the evidence has sufficient indicia of reliability, (2) the court makes explicit findings of fact as to credibility, and (3) the defendant has an opportunity to rebut the evidence." *United States v. Hernandez*, 906 F.3d 1367, 1369 (11th Cir. 2018).

The Movant's arguments relate to the first factor under *Hernandez*—sufficient indicia of reliability. Detective Monros testified that he had investigated over one hundred cases of credit card fraud, had examined over one hundred thousand files of credit card data, and had familiarity with credit card skimming devices. He further testified about observations that he made while surveilling the Movant and his co-defendants and investigating the case. Thus, any objection that Detective Monros's testimony lacked sufficient indicia of reliability would have been meritless, and counsel cannot perform deficiently in failing to make a meritless objection. *See Denson v. United States*, 804 F.3d 1339, 1342 (11th Cir. 2015) ("Failing to make a meritless objection does

not constitute deficient performance."). In addition, the Movant cannot demonstrate that the lack of a meritless objection prejudiced him. The Movant has not shown deficient performance or prejudice, and thus, he is not entitled to relief on his first claim.

B. Claim 2: A Forensic Expert

Second, the Movant argues that his counsel rendered ineffective assistance by failing to call a forensic expert to testify: (1) "that the skimming devices were not capable of skimming 3,659 credit card numbers"; (2) "whether the skimmed numbers located in the co-defendant's computer before the charged conspiracy were duplicated, actual credit card numbers"; and (3) the dates [the credit cards] were skimmed." DE-CV 3-1 at 16. The Movant contends that a forensic expert would have shown that he was not responsible for the 3,659 credit card numbers found on the seized laptop.

The Movant's assertions are conclusory and speculative. He does not offer support to show what a forensic expert would have testified or how such testimony would contradict Detective Monros's testimony. As a result, such assertions are insufficient to establish ineffective assistance of counsel. *See Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1324 (11th Cir. 2002) ("It is well-settled in this Circuit that a petitioner cannot establish an ineffective assistance claim simply by pointing to additional evidence that could have been presented."); *Johnson v. Alabama*, 256 F.3d 1156, 1187 (11th Cir. 2001) (stating that mere speculation that a missing witness would have been helpful is insufficient to demonstrate ineffective assistance of counsel); *Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992) ("Conclusory allegations of ineffective assistance are insufficient." (quotation marks omitted)).

Moreover, "[w]hich witnesses, if any, to call . . . is the epitome of a strategic decision, and it is one that [a court] will seldom, if ever, second guess." *Conklin v. Schofield*, 366 F.3d 1191,

1204 (11th Cir. 2004) (quotation marks omitted). "Even if in retrospect the strategy appears to have been wrong, the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it." *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983). Counsel's decisions to cross examine Detective Monros about his investigation and the skimming devices and not to call a forensic expert for the defense were not so patently unreasonable such that no competent attorney would have made that choice. The Movant has not demonstrated that his counsel performed deficiently.

The Movant also has failed to demonstrate prejudice because he does not explain how the testimony of a defense forensic expert would have impacted the Court's sentencing decision. Detective Monros acknowledged that the skimming devices recovered from gasoline stations that he saw the Movant visit held approximately 160 credit card numbers. Detective Monros further acknowledged that he did not know when the over 3,000 credit card numbers on the seized laptop had been downloaded. Despite these acknowledgements and the lack of direct evidence connecting the Movant to the credit card numbers on the seized laptop, the Court found that the Movant was responsible for the numbers on the laptop. The Movant does not explain how additional testimony might have changed the Court's finding and thus does not demonstrate prejudice. Because the Movant has not shown deficient performance or prejudice, he is not entitled to relief on his second claim.

C. Claim 3: Cumulative Error

Finally, the Movant argues that the cumulative impact of his counsel's errors deprived him of the assistance of counsel and caused him prejudice. As explained above, the Movant has identified no deficiency in counsel's performance. There is no error to accumulate when none of a defendant's individual claims of error or prejudice have merit. *Morris v. Sec'y, Dep't of Corr.*,

677 F.3d 1117, 1132 (11th Cir. 2012). Consequently, the Movant is not entitled to relief on his claim of cumulative error.

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

1. Movant Carlos Fleitas's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 [DE-CV 1; DE-CR 170] is **DENIED**.

2. An evidentiary hearing is denied, as the Motion, files, and records conclusively show that the Movant is not entitled to relief. *See* 28 U.S.C. § 2255(b).

3. No Certificate of Appealability shall issue, as the Movant has not "made a substantial showing of the denial of a constitutional right." *See id.* § 2253(c)(2).

4. The Clerk of the Court is instructed to **CLOSE** Case No. 1:20-CV-22362. Any deadlines are **TERMINATED**, any hearings are **CANCELED**, and any motions are **DENIED AS MOOT**.

DONE AND ORDERED in West Palm Beach, Florida, this 25th day of October, 2021.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to: Movant; Counsel of Record