UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5602
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH AMIEL GROSS, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(SA 91 CA 1270 (SA 88 CR 252 1)

(September 2, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Petitioner-appellant, Joseph Amiel Gross, Jr. (Gross), appeals the district court's dismissal of his federal habeas petition under 28 U.S.C. § 2255. We affirm.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

On January 12, 1988, Gross and another man stole $17,877 from the Bank of Leon Springs (the deposits of which were then insured by the F.D.I.C.) in a successful armed robbery in which both criminals brandished firearms. Prior to his arrest, Gross voluntarily submitted to questioning by the FBI. During this interrogation, Gross informed FBI agents that he was in Corpus Christi on the day of the bank robbery. Gross later admitted that he burned his $7,500 share of the proceeds when he learned that he was a suspect in the robbery.

Gross was arrested and charged with armed bank robbery and conspiracy to commit bank robbery. On August 21, 1989, pursuant to a plea bargain in which the government agreed to drop the conspiracy charge, Gross pleaded guilty to armed bank robbery.

At the sentencing hearing, the United States Attorney stated that Gross was equally culpable with his co-conspirator because Gross obtained the get-away car, actually picked the bank to be robbed, and knew the area in which the robbery took place. Gross did not then object to this characterization of his role in the offense. On November 17, 1989, Gross was sentenced to serve a seventy-month term of imprisonment followed by a term of five years of supervised release. Gross was also ordered to make restitution in the amount of $17,877. The restitution order stated: "It is further ordered the Defendant [Gross] make restitution to the Bank of Leon Springs for $17,877, excepting no further payments shall be required after the sum of the amounts actually paid by all Defendants [Gross and his partner] is fully recovered for the

compensable injury."

Gross did not file a direct appeal challenging his plea or sentence. He then instituted this section 2255 action on December 17, 1991. His first amended complaint[1] raised the following claims: (1) that he was entitled to a two to four offense level reduction because he was only a minor participant in the offense; (2) that his offense level should not have been increased for obstruction of justice because he did not give a false alibi to the FBI; (3) that his offense level should have been decreased by two for acceptance of responsibility since he pleaded guilty; (4) the restitution order should be reduced because the victim received compensation from its insurance company and because both he and his codefendant were ordered to repay the entire amount of the bank's loss; and (5) that his trial counsel was ineffective for failing to object to the findings in the Presentence Report (PSR) relating to obstruction of justice and to the order of restitution, and for failing to file a Rule 32(c)(3)(d) motion to correct the record.

After the government responded to his complaint, Gross filed a reply to the government's response in which he offered a new allegation: counsel was ineffective by not filing a notice of appeal from his original conviction. This reply did not contain any factual explanation of why no direct appeal was taken or how his counsel was ineffective in failing to appeal (and it did not allege that Gross was unaware or uninformed of his right to appeal). When filing this reply brief, Gross did not seek or

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[1] Gross sought and was granted leave of court to file this amended complaint.

obtain leave of court to file this reply as an amendment to his complaint, even though the government had already filed a response to his first amended complaint.

Four days later, the magistrate judge to whom the matter was referred issued her report and recommendation. The magistrate judge recommended that the first three claims be dismissed because challenges to the application of the United States Sentencing Guidelines (Guidelines) cannot be raised under section 2255. The magistrate judge recommended dismissal of the restitution claim on the grounds that the restitution order did not allow the bank to make a double recovery because it held that the defendants were jointly and severally liable for the loss and because if the bank was reimbursed by an insurance company for its loss, restitution would still be owed to the insurance company by virtue of subrogation. As for the three ineffective assistance claims raised in Gross's first amended complaint, the magistrate judge concluded that they lacked merit. The magistrate did not address the new ineffective assistance claim raised in Gross's reply brief.

Gross filed objections to the magistrate judge's report in which he attempted to recharacterize his direct Guidelines challenges as indirect Guidelines challenges claiming that his trial counsel ineffectively raised these issues at the sentencing hearing. Gross also stated in his objections to the magistrate's report that trial counsel failed to advise him that he had a right to file a direct appeal and that to do so a notice of appeal would have to be filed within ten days of the entry of sentence, and that the district court had not so advised him. Gross did not seek to

amend (or request leave to amend) his first amended complaint.

The district judge adopted the magistrate judge's recommendations, refused to consider the ineffective assistance of counsel claim raised for the first time in Gross' objections to the magistrate judge's report because it was untimely and the government never had a chance to respond to that claim, and entered judgment dismissing Gross' habeas petition. Gross appeals.[2]

Discussion

First, we address Gross's claims that the district court erred in computing his offense level by refusing to decrease the offense level on the grounds that Gross was a minor participant, that Gross accepted responsibility for his offense, and that the district court erred in enhancing his offense level for obstruction of justice. "Relief under 28 U.S.C.A. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992) (Guidelines challenges not raised on direct appeal cannot be raised in habeas; firearms and obstruction applications challenged); *United States v. Perez*, 952 F.2d 908, 909 (5th Cir. 1992) (acceptance of responsibility and minor participant status cannot

[2] In Gross's reply brief on appeal, he complains in one sentence that the district court did not afford him the right to a direct appeal. We will not consider this issue because it was raised for the first time in a reply brief on appeal. *United States v. Prince*, 868 F.2d 1379, 1386 (5th Cir.), *cert. denied*, 110 S.Ct. 321 (1989) ("This court will not consider a new claim raised for the first time in an appellate reply brief.").

be challenged under section 2255). Thus, claims that do not involve constitutional questions and were not raised in a direct appeal are not cognizable under 28 U.S.C. § 2255. *Vaughn*, 955 F.2d at 368. Gross's claims involve applications of the Guidelines and do not raise constitutional questions.[3] The district court did not err in denying Gross relief on these claims.

Next, Gross challenges the sentencing court's restitution order. Gross claims that the restitution order is defective because it allows the bank to make a double or triple recovery by allowing the bank to collect $17,877 from Gross, his partner, and the bank's insurance company. Restitution orders may be challenged in a section 2255 action. *United States v. Plewniak*, 947 F.2d 1284, 1289-90 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1239 (1992). And, "Congress has mandated that restitution not result in double recoveries by crime victims, *see* 18 U.S.C. § 3579(e)(1)." *United States v. Atkinson*, 788 F.2d 900, 904 (2d Cir. 1986). However, Gross's challenge lacks merit since he did not show that the order

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[3] We observe that these claims lack merit anyway. The decision to grant a reduction for acceptance of responsibility is left to the discretion of the sentencing court, and Gross has failed to show that the district court erred. *See, e.g., United States v. Brigman*, 953 F.2d 906, 909 (5th Cir.), *cert. denied*, 113 S.Ct. 49 (1992) (greater deference than under clearly erroneous standard given on this issue). With respect to the obstruction issue, the fact that Gross burned his share of the proceeds is sufficient to justify an enhancement for obstruction, even if the sentencing court erred in finding that Gross lied to the F.B.I. With respect to the reduction for minor participant status, Gross has offered no evidence showing that he was not as involved in perpetrating the crime as his partner. The fact that Gross may have stood guard at the door while his partner collected money from the tellers does not make him a minor participant in light of the evidence of his other involvement in the offense.

in this case would allow for a double recovery by the Bank of Leon Springs. First, contrary to Gross's argument, the restitution order does not allow the bank to recover the full amount of its loss from both Gross and his partner. Since the restitution order stated: "It is further ordered the Defendant [Gross] make restitution to the Bank of Leon Springs for $17,877, excepting no further payments shall be required after the sum of the amounts actually paid by all Defendants [Gross and his partner] is fully recovered for the compensable injury," it made the two bank robbers jointly and severally liable for the money. *United States v. All Star Industries*, 962 F.2d 465, 477-78 (5th Cir.), *cert. denied*, *sub nom*. *Midco Pipe & Tube, Inc. v. United States,* 113 S.Ct. 377 (1992) (all co-conspirators may be held jointly and severally liable for total loss caused by their scheme even when some conspirators are more involved in perpetrating the offense than others). While the bank can collect the full amount from either criminal, once it recovers its loss it cannot collect any more money. Thus, if Gross's partner pays off the entire amount of their joint obligation to the bank, Gross is relieved of his duty to make restitution.

Second, Gross claims that the fact that the bank collected insurance money as a result of the loss caused by his theft prevents the bank from recovering the money again from Gross. Gross, however, has failed to show that the bank was, in fact, insured against theft or that the bank actually collected any money

on an insurance policy as a result of the theft.[4] Moreover, the fact that the bank may have insurance to cover theft losses does not relieve Gross of his obligation of restitution. When a crime victim recovers money from a third party, such as an insurance company, as a result of the crime, the criminal's obligation of restitution shifts from the victim to the third party. 18 U.S.C. § 3579(e)(1) (1988); *United States v. Golomb*, 811 F.2d 787, 791-92 (2d Cir. 1987) (order of victim restitution modified to require restitution be paid to insurance company if insurance company pays victim's claim). Thus, if the Bank of Leon Springs collected money from an insurance company for this loss, Gross would not be relieved of his duty of restitution, he would just have to pay the insurance company instead of the bank. Since Gross has not shown that the bank recovered any insurance money, there is no need for us to modify the order of restitution at this time. If, however, it is later shown that the bank collected insurance money, the order of restitution can be modified accordingly. Even if the order were modified, Gross would not be affected, because he would still owe the same amount of money.[5] Since Gross has failed to show that the order of restitution would result in a double recovery for the bank, Gross is not entitled to relief on this

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[4] The mere fact that a bank's deposits are insured by the F.D.I.C. does not mean that a bank is insured against theft.

[5] If Gross paid the bank after the bank collected insurance money, Gross would not be prejudiced as the existing court order would not give the insurance company the right to collect from Gross. The bank, however, would likely be obligated to forward the money collected from Gross to its insurer.

claim.[6]

The final argument raised in Gross's amended complaint and reiterated on appeal is that his trial counsel was ineffective for failing to object to the findings in the PSR relating to obstruction of justice and the order of restitution at the sentencing hearing.[7] To obtain relief on an ineffective assistance of counsel claim, a petitioner must show that his counsel's conduct was objectively deficient and that the defendant was thereby prejudiced. *Strickland v. Washington*, 104 S.Ct. 2052, 2064 (1984). Concerning counsel's failure to object to the enhancement for obstruction of justice, Gross has failed to show that his counsel's performance was deficient. The evidence showed that Gross admitted

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[6] Similarly, if, as Gross alleges in his reply brief in this Court, the Bank of Leon Springs is out of business at the time that Gross's obligation to pay restitution begins, the restitution order should be modified to allow Gross to pay the bank's successors in interest, if any exist, or, perhaps, cancelled.

[7] Gross's amended complaint also alleged that his counsel was ineffective because counsel failed to file a Rule 32(c)(3)(d) motion to correct the record. No prejudice to Gross is shown (see note 3, *supra*). Further, this argument was not raised in Gross's original brief on appeal. It was raised only in a conclusory fashion in Gross's reply brief. Gross has not properly placed this issue before the Court. *See generally Prince*, 868 F.2d at 1386. On appeal, Gross also contended that his counsel was ineffective in failing to object to the sentencing court's failure to decrease his offense level for acceptance of responsibility. This issue (meritless in any event, see note 3, *supra*) was not raised before the district court at all. *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1163 (5th Cir. 1992) (we do not review issues raised for the first time on appeal unless our failure to do so gives rise to a manifest miscarriage of justice); *United States v. Garcia-Pillado*, 898 F.2d 36, 39 (5th Cir. 1990). Since our failure to address these claims would not give rise to a manifest miscarriage of justice, we will not address them. Gross is not entitled to relief on these grounds.

burning his share of the money. Destruction of evidence is a sufficient reason to enhance a sentence for obstruction. U.S.S.G. § 3C1.1 Comment 3(d) (1992). Counsel's failure to raise an obviously meritless objection is not deficient performance under *Strickland*.[8] Nor is prejudice shown. With respect to counsel's failure to object to the order of restitution, since we have found that Gross's objections to the restitution order lack merit, it is impossible for Gross to show that he was prejudiced by his counsel's failure to object to the restitution order.

Gross's final claim involves the failure to file a direct appeal. Initially, Gross contended in a one sentence statement in his reply brief filed with the district court four days before the magistrate judge issued her report that his counsel was ineffective because counsel failed to file a direct appeal for him. Then, in his objections to the magistrate judge's report, Gross added flesh to this complaint by alleging that counsel failed to inform him that he had a right to a direct appeal. Gross's first allegation in the reply brief filed with the district court was too conclusory to state a claim inasmuch as there are many legitimate reasons why counsel may not file a direct appeal challenging a guilty plea.[9] While Gross's later allegation may raise a justiciable claim since

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[8] Gross also alleges that the obstruction enhancement was not justified since he did not give a false alibi to the F.B.I. Since the burning of the money is a sufficient justification for the sentence enhancement, we need not address this issue.

[9] *Cf. Childs v. Collins*, 995 F.2d 67 (5th Cir. 1993) (if the defendant is informed of his right to appeal and does not request counsel to appeal, counsel's failure to give notice of appeal is not ineffective assistance).

an attorney generally has a duty to advise a client of his right to appeal, this allegation was raised without leave of court to amend his complaint. The district court, in acting on the magistrate judge's report, addressed this allegation but expressly refused to consider it, stating:

> ". . . the Court will not consider these new allegations in its review of the motion to vacate currently before the Court because the Government has not had an adequate opportunity to respond to this bare allegation. This new allegation is simply not properly part of the motion to vacate pending before this Court. Petitioner may decide to pursue such allegation in another motion to vacate where it may be subject to attack for abuse of the writ."

The district court did not abuse its discretion in declining to consider this belated assertion. *See United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992) (issues raised for the first time in objections to the magistrate judge's report, without first obtaining leave of court to amend one's complaint, are not properly before the district court and will not be reviewed on appeal).

Conclusion

Gross is not entitled to relief under 28 U.S.C. § 2255 for any of the claims he has properly raised and preserved in this matter. Accordingly, the judgment of the district court dismissing his habeas petition is

AFFIRMED.