

Appendix "A"

Order denying the motion for reconsideration

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13292-B

LOUIE ANTHONY SALEMI,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: TJOFLAT and MARCUS, Circuit Judges.

BY THE COURT:

Louie Anthony Salemi has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's October 27, 2017, order denying a certificate of appealability and leave to proceed *in forma pauperis*. Upon review, Salemi's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Appendix "B"

Order denying the application for COA

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13292-B

LOUIE ANTHONY SALEMI,

Petitioner-Appellant,

VERSUS

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Louie Salemi moves for a certificate of appealability, as construed from his notice of appeal, in order to appeal the denial of his motion to vacate, set aside, or correct sentence, filed pursuant to 28 U.S.C. § 2255. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

Appendix "C"

Order by the district court denying 28 U.S.C. § 2255 motion

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LOUIE ANTHONY SALEMI,

Petitioner,

v.

**Case No: 6:16-cv-931-Orl-41TBS
(6:14-cr-6-Orl-41TBS)**

UNITED STATES OF AMERICA,

Respondent.

ORDER

THIS CAUSE is before the Court on Petitioner Louie Anthony Salemi's Motion to Vacate, Set Aside, or Correct Sentence ("Motion to Vacate," Doc. 1) pursuant to 28 U.S.C. § 2255. Respondent filed a Response to the Motion to Vacate ("Response," Doc. 7) in compliance with this Court's instruction. Petitioner filed a Reply to the Response ("Reply," Doc. 8).

Petitioner asserts three grounds in his Motion to Vacate. For the following reasons, the Motion to Vacate will be denied.

I. PROCEDURAL HISTORY

A grand jury charged Petitioner by Indictment with distribution of child pornography (Count One) in violation of 18 U.S.C. § 2252A(a)(2)(A), receipt of child pornography (Count Two) in violation of 18 U.S.C. § 2252A(a)(2)(A), and possession of child pornography (Count Three) in violation of 18 U.S.C. § 2252A(a)(5)(B). (Criminal Case No. 6:14-cr-6-Orl-41TBS, Doc. 17).¹ Petitioner entered a plea of guilty to Counts One and Three pursuant to a Plea Agreement before Magistrate Judge Thomas B. Smith. (Criminal Case, Doc. 41). Magistrate Judge Smith filed

¹ Criminal Case No. 6:14-cr-6-Orl-41TBS will be referred to as "Criminal Case."

a Report and Recommendation, recommending that the plea be accepted and that Petitioner be adjudicated guilty of Counts One and Three. (Criminal Case, Doc. 46). The Court accepted the plea and adjudicated Petitioner guilty of Counts One and Three. (Criminal Case, Doc. 49). The Court sentenced Petitioner to a 235-month term of imprisonment for Count One and to a consecutive 58-month term of imprisonment for Count Three. (Criminal Case, Doc. 68). The Government dismissed Count Two. (*Id.*). Petitioner appealed but subsequently moved to voluntarily dismiss his appeal. The Eleventh Circuit Court of Appeals granted the motion. (Criminal Case, Doc. 101).

The Government filed a motion to reduce sentence. (Criminal Case, Doc. 102). The Court granted in part and denied in part the motion, reducing Petitioner's sentence for Count One to a 211-month term of imprisonment with the term for Count Two to remain unchanged. (Criminal Case, Doc. 108). Petitioner did not appeal.

II. LEGAL STANDARD

The Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense. *Id.* at 687-88. The prejudice requirement of the *Strickland* inquiry is modified when the claim is a challenge to a guilty plea based on ineffective assistance. See *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). To satisfy the prejudice requirement in such claims, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted). Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

III. ANALYSIS

A. Ground One

Petitioner asserts counsel rendered ineffective assistance by failing to (1) provide him with discovery so he could make an informed decision whether to enter a plea or proceed to trial, (2) conduct an adequate pretrial investigation, and (3) inform him of the consequences of pleading guilty including the maximum sentence he faced if convicted at trial. (Doc. 1 at 4).

The Court concludes that ground one is vague, speculative, and otherwise without merit.

See Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991) (holding that vague, conclusory, or speculative allegations cannot support claim of ineffective assistance of counsel). Petitioner does not specify what discovery counsel failed to provide him, what counsel failed to investigate, or how Petitioner's receipt of discovery or counsel's investigation would have resulted in Petitioner foregoing the plea and proceeding to trial. *See* Doc. 2 at 19-21 (Petitioner's Memorandum of Law in Support of Motion to Vacate generally asserting counsel failed to familiarize himself with the relevant facts of the case and potential consequences of conviction and failed to independently investigate case). With respect to Petitioner's contention that counsel failed to inform him of the maximum penalties he faced if convicted at trial, Petitioner was advised at his plea hearing that he was subject to maximum terms of twenty-years of imprisonment for Counts One and Three. (Criminal Case Doc. 79 at 12). Counts One and Two charged violations of the same statute. Therefore, Petitioner knew the potential sentence to which he was subject if he proceeded to trial when he entered his plea. Furthermore, Petitioner advised the Court at his plea hearing that he was satisfied with counsel's representation and had no complaints or concerns about counsel. Petitioner's representations constitute "a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). In sum, Petitioner has not established either deficient performance or prejudice. Accordingly, Ground One is denied pursuant to *Strickland*.

B. Ground Two

Petitioner contends counsel rendered ineffective assistance by failing to (1) review, discuss, and explain the Presentence Investigation Report ("PSR"), (2) argue for mitigation of his sentence, and (3) object to his sentence being substantively unreasonable. (Doc. 1 at 5). In support of this ground, Petitioner complains that counsel failed to object to the PSR or to argue for a downward

departure based on his substantial assistance. (Doc. 2 at 23).

Petitioner has not demonstrated either deficient performance or prejudice. Petitioner told the Court at sentencing that he had reviewed the PSR and discussed it with counsel. (Criminal Case Doc. 80 at 4-5). Petitioner's contention that counsel failed to review the PSR with him is refuted by his own representations to the Court. Furthermore, Petitioner does not specify to what counsel should have objected to in the PSR, nor has he shown that the unspecified objections would have been sustained.

Similarly, Petitioner has not explained the basis on which counsel should have argued for mitigation of the sentence. To the extent Petitioner relies on his substantial assistance, the Court notes that pursuant to the plea agreement, the Government agreed to consider whether Petitioner provided substantial assistance and to move for a downward departure if warranted at sentencing. (Criminal Case Doc. 41 at 5-6). The Government, however, did not move for a downward departure based on substantial assistance. Counsel, therefore, cannot be deemed deficient for failing to make a meritless argument. In addition, Petitioner's sentence was reduced after sentencing based on a motion filed by the Government premised on his substantial assistance. Finally, Petitioner received a sentence within the guidelines range, and a reasonable probability does not exist that Petitioner would have received a lesser sentence had counsel objected to the PSR or the reasonableness of the sentence or sought a reduced sentence. Accordingly, Ground Two is denied pursuant to *Strickland*.

C. Ground Three

Petitioner asserts counsel rendered ineffective assistance by failing to (1) communicate with him regarding the issues to be raised on appeal, (2) allow him to participate in the appeal process, and (3) raise stronger issues on appeal. (Doc. 1 at 6).

Petitioner has not established either deficient performance or prejudice. Petitioner does not specify what issues counsel should have raised on appeal. Additionally, as noted *supra*, Petitioner received a sentence within the guidelines range. Furthermore, the plea agreement contained an appeal waiver provision, and there were no objections to the PSR or the sentence. Petitioner, therefore, has not demonstrated a reasonable probability exists that his appeal would have been meritorious had counsel communicated with him or raised other issues on appeal. Accordingly, Ground Three is denied pursuant to *Strickland*.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

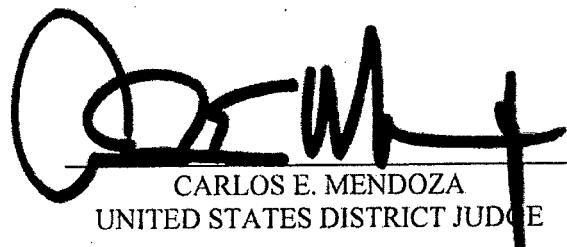
Accordingly, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Petitioner's Motion to Vacate, Set Aside, or Correct Sentence (Doc. 1) is **DENIED**, and this case is **DISMISSED** with prejudice.
2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.
3. The Clerk of the Court is directed to file a copy of this Order in criminal case number 6:14-cr-6-Orl-41TBS and to terminate the motion (Criminal Case, Doc. 109) pending in that case.
4. This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to make a substantial showing of the denial of a constitutional right.² Accordingly, a certificate of appealability is

² Pursuant to the *Rules Governing Section 2255 Proceedings for the United States District Court*, "[t]he district court must issue or deny a certificate of appealability when it enters a final

DENIED in this case.

DONE and **ORDERED** in Orlando, Florida on May 22, 2017.



CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

order adverse to the applicant." *Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 11(a).

Appendix "D"

Order granting the extension of time to file petition