No. 17-5519

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 16, 2018
DEBORAH S. HUNT, Clerk

REGINALD HOUGH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: BOGGS, CLAY, and KETHLEDGE, Circuit Judges.

Reginald Hough petitions for rehearing en banc of this court's order entered on February 7, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

No. 17-5519

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 29, 2018
DEBORAH S. HUNT, Clerk

REGINALD HOUGH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: BOGGS, CLAY, and KETHLEDGE, Circuit Judges.

Reginald Hough, a pro se federal prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 17-5519

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REGINALD HOUGH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Reginald Hough, a federal prisoner proceeding pro se, appeals a district court judgment denying his motion to vacate his sentence under 28 U.S.C. § 2255. The court construes Hough's notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b). Hough moves to proceed in forma pauperis on appeal.

In 2011, a jury convicted Hough of attempting to receive child pornography, in violation of 18 U.S.C. § 2252(a)(2)(A). The district court sentenced him to 210 months of imprisonment. This court affirmed. *United States v. Hough*, No. 11-6510 (6th Cir. Feb. 13, 2013) (order), *cert. denied*, 569 U.S. 936 (2013).

In 2014, Hough filed a § 2255 motion, arguing that: (1) his due process rights were violated when Detective Kevin Lamkin was permitted to provide "expert" testimony; (2) his Fourth and Sixth Amendment rights were violated because counsel failed to move to suppress evidence; (3) his Fourth and Sixth Amendment rights were violated because counsel failed to challenge the veracity of statements included in the search warrant affidavit; (4) his right to confront witnesses was violated because the government was permitted to play a video recording

of Officer Leigh Kemper's post-arrest interrogation of Hough; (5) the government withheld allegedly exculpatory evidence; (6) the trial court erroneously admitted evidence of "other things" that was not relevant to the criminal charges filed against him; (7) the government allegedly relied on perjured statements contained on the recording of his interrogation from the night of his arrest and manipulated evidence; (8) counsel was ineffective for failing to conduct adequate preparation or explore potential defenses for a trial; and (9) his due process rights were violated when the investigating officers erroneously permitted his ex-wife to use the computer after they arrived following her report of discovering child pornography on the computer.

A magistrate judge filed a report, recommending that the district court deny the § 2255 motion. First, the magistrate judge concluded that Hough failed to establish that counsel rendered ineffective assistance with respect to claims 2, 3, and 8. Next, the magistrate judge recommended that Hough procedurally defaulted his remaining claims by not asserting them on direct appeal. The magistrate judge reasoned that, although Hough argued that trial and appellate counsel's allegedly deficient performance constituted cause to excuse the procedural default, counsel's performance was not deficient or that the underlying claims lacked merit. The district court rejected Hough's objections, adopted the magistrate judge's recommendation, and denied the § 2255 motion.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the district court's denial is based on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court's denial is based on a procedural ruling, the petitioner must demonstrate that "jurists of reason would find it debatable whether the [motion] 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.* Hough has not met this burden.

Ineffective Assistance of Counsel Claims

Hough failed to make a substantial showing that trial and appellate counsel's performance was deficient and that it prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The district court concluded that counsel was not ineffective for failing to move to suppress evidence seized during Hough's arrest and the search of his home. Hough argued that the search warrant application did not establish probable cause and that the affidavit submitted in support of the application was "bare bones" and included false information that his then-wife (Rhonda Maurer) advised the affiant that she had discovered screen names that had been used to proposition a fifteen-year-old female for sexual activity. Hough also argued that any probable cause ceased to exist because Maurer was unable to find the images on the computer after the police had arrived. "The Fourth Amendment mandates that a search warrant may only be issued upon a showing of probable cause." *United States v. Thomas*, 605 F.3d 300, 307 (6th Cir. 2010). "Probable cause exists where there is a fair probability, given the totality of the circumstances, that contraband or evidence of a crime will be found in a particular place." *United States v. Wagers*, 452 F.3d 534, 538 (6th Cir. 2006) (quoting *United States v. Helton*, 314 F.3d 812, 819 (6th Cir. 2003)).

The district court rejected Hough's probable-cause argument, concluding that the affidavit identified Hough's then-wife as the source of the information concerning potentially criminal conduct and that the nature of Maurer's relationship with Hough supported the credibility of the allegations she made to the police. In addition, Maurer provided specific details concerning the type and amount of material that she discovered on Hough's computer. The district court concluded that, under these circumstances, although the search warrant affidavit was short, it was not "bare bones" because it provided "some underlying factual circumstances regarding veracity, reliability, and basis of knowledge." *United States v. McPhearson*, 469 F.3d 518, 526 (6th Cir. 2006) (quoting *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996)). Reasonable jurists would not debate the district court's ruling on this issue.

Next, the district court rejected Hough's argument that counsel should have sought a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), in order to challenge the veracity of the statements set forth in the search warrant affidavit. Hough argued that the search warrant contained false information because: (1) Maurer testified, during trial, that she did not recall making any statements concerning screen names used to solicit sexual activity from a minor; (2) no videos were discovered on his computer; and (3) images of child pornography were discovered in an unallocated space on the computer, not in his email. The district court concluded that because there was no indication that the affiant intentionally misrepresented any of the facts provided to him by Maurer, there was no need for a *Franks* hearing, *see id.* at 155-56, and counsel thus did not perform deficiently. Reasonable jurists would not debate the district court's ruling on this issue.

Finally, the district court concluded that Hough failed to establish that counsel did not adequately prepare for trial. Because Hough partially relied on the arguments asserted in support of the claims addressed above, and the district court rejected those claims as being without merit, the court rejected the cumulative claim as well. Reasonable jurists would not debate the district court's ruling on this issue.

Substantive Constitutional Claims—Procedural Bar

The district court rejected Hough's remaining claims as procedurally barred, concluding that he failed to assert them on direct appeal. Generally, if a defendant fails to assert a claim on direct appeal, it is procedurally defaulted. *Regalado v. United States*, 334 F.3d 520, 528 (6th Cir. 2003). A procedurally defaulted claim "may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley v. United States*, 523 U.S. 614, 622 (1998) (quoting *Murray v. Carrier*, 477 U.S. 478, 485, 496 (1986)). Although the district court construed Hough's petition as asserting that counsel's allegedly deficient performance constitutes cause to excuse the default, the district court determined that Hough failed to establish that counsel's performance prejudiced him.

First, the district court rejected Hough's challenge to Detective Lamkin's allegedly improper "opinion" testimony. Hough argued that Lamkin, a lay witness, improperly provided "expert" and lay opinion testimony concerning the forensic examination of Hough's computer. Rule 701 allows opinion testimony by a lay witness so long as it is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. This court has explained that "lay testimony 'results from a process of reasoning familiar in everyday life,' whereas 'an expert's testimony results from a process of reasoning which can be mastered only by specialists in the field.'" *See United States v. White*, 492 F.3d 380, 401 (6th Cir. 2007) (quoting *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992)).

The district court determined that counsel did not perform deficiently so as to excuse Hough's procedural default because counsel thoroughly cross-examined Lamkin concerning opinion testimony, whether "lay" or "expert," and because the court admonished the jury to disregard Lamkin's testimony when he opined that an image on Hough's computer "appeared" to involve a girl who was under eighteen years of age engaging in sexual activity. The district court concluded that Lamkin properly provided technical and scientific testimony concerning the forensic examination of Hough's computer because that testimony was based on his specialized knowledge as a computer forensic examiner. The district court noted that, during a bench conference, the government provided notice that Lamkin would be providing testimony based on his specialized training. Furthermore, the district court noted that the United States complied with its duty under Fed. R. Crim. P. 16 to provide the defendant with a summary of Lamkin's testimony. Reasonable jurists would not debate the district court's ruling on these issues.

Next, the district court rejected Hough's claim that the government violated his rights under the Confrontation Clause. The Confrontation Clause prohibits the prosecution from substituting former testimony for live testimony unless the prosecution demonstrates that the witness is unavailable for trial and the defendant had an earlier opportunity to cross-examine

him. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Hough argued that the government violated his rights when it played a redacted version of a video of his post-arrest interrogation conducted by Officers Jayme Schwab and Leigh Kemper. Relying on *Davis v. Washington*, 547 U.S. 813, 822 (2006), which held that statements "are testimonial when . . . the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution," Hough argues that Kemper made statements during the interrogation that were testimonial and that, because Kemper did not testify at trial, the admission of those statements violated his confrontation rights..

The district court concluded that Hough's reliance on *Davis* was misplaced because that case held that the arrestee's statements/responses to questions were testimonial statements, not that the officer's questions constituted testimonial statements. *See id.* at 822 n.1, 832 n.6. The district court determined that counsel did not perform deficiently so as to excuse Hough's procedural default, in part, because counsel filed a motion to suppress the video. Whether or not Kemper's statements were testimonial, and thus admitted in violation of Hough's confrontation rights, Hough cannot show prejudice. Kemper made statements during the interview regarding the nature of the images recovered on Hough's computer and how those images were stored or distributed. But the images were published to the jury, and Detective Lamkin testified at length at trial about the state in which he found that information on Hough's computer. So, Hough has not shown, even assuming his counsel erred in failing to object to Kemper's statements, that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Reasonable jurists would not debate that Hough cannot show prejudice.

The district court rejected Hough's claim that the government allegedly withheld exculpatory evidence and witness statements, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), or the Jencks Act, 18 U.S.C. § 3500(a). To establish a *Brady* violation, a defendant must demonstrate that (1) the evidence at issue is favorable to her, either because it is exculpatory or impeaching; (2) the government suppressed the evidence, whether willfully or inadvertently; and

(3) prejudice resulted. *O'Hara v. Brigano*, 499 F.3d 492, 502 (6th Cir. 2007). Under the Jencks Act, after a witness has testified on direct examination for the government, the government must provide the defendant with any "statements" made by the witness to the extent those "statements" relate to the subject of the witness's testimony. 18 U.S.C. § 3500(b).

The district court concluded that counsel was not ineffective for failing to challenge the government's failure to provide him with various items of allegedly exculpatory evidence, including: (1) a copy of Kemper's investigation notes; (2) the "criminal complaint"; (3) a copy of the records of the program used to examine his computer, and a copy of the contents of a folder labelled "MINE" from his computer; and (4) an accurate copy of the original recording of his police interrogation. Hough also argued that the government should have provided him with copies of FBI interviews with Maurer's sons and daughter-in-law. The district court rejected Hough's arguments because he failed to establish that Kemper's investigation notes would be exculpatory, he was aware of the nature of his wife's "complaint" that he had engaged in criminal activity, the government credibly stated that it disclosed all relevant information from its forensic examination of Hough's computer and the defense conducted its own forensic examination, and the government provided Hough with an unedited copy of the video recording of his post-arrest interview. The district court rejected Hough's argument that the prosecution wrongfully suppressed potential testimony from Maurer's sons (Michael Thomas and Carl Egly) and daughter-in-law (Angel Thomas) that would have established that Maurer bragged to them about framing Hough by placing child pornography on his computer. The district court concluded that counsel was not ineffective for failing to obtain the Thomases' statements, in part, because this court affirmed the district court's ruling that their statements constituted inadmissible hearsay. With respect to Egly, the district court rejected Hough's claim because Hough did not allege that Egly actually provided any testimony on behalf of the government, because Hough asserted that he knew what Egly would testify, and because counsel diligently pursued Egly's testimony by subpoenaing him. Reasonable jurists would not debate the district court's ruling on these issues.

Next, the district court rejected Hough's argument that the admission of evidence concerning his use of adult pornography constituted improper use of other "bad acts" evidence. The court concluded that Hough should have raised this issue on direct appeal and determined that counsel did not perform deficiently because he successfully moved to exclude other bad acts evidence related to sexual assault or contact with minors and the images that were admitted were described as suspected child pornography. Reasonable jurists would not debate the district court's ruling on this issue.

The district court also rejected Hough's challenge to the allegedly improper use of perjured testimony and "manipulated" evidence. Hough argued that witnesses provided false testimony that there were images and videos in a folder named "MINE," that the child pornography images had come from the internet, and that no police officer had accessed his computer during the search other than Officer Lamkin. He also argued that the video of his post-arrest interrogation had been altered. The district court concluded that Hough failed to present any persuasive evidence to support his conclusory assertions that the challenged testimony was false or that the video had been wrongfully altered. The court also concluded that counsel did not perform deficiently because Hough had received an unredacted version of the video of his interrogation and because edits had been made by the government in accordance with the court's pretrial rulings. Counsel had also thoroughly cross-examined the government's witnesses. Reasonable jurists would not debate the district court's ruling on this issue.

Finally, the district court rejected Hough's claim that his due process rights were violated when the investigating officers allegedly tainted the evidence in the case because they allowed Maurer to access his computer after they arrived at his residence. The district court determined that Hough had procedurally defaulted the issue of Maurer's use of the computer and the alleged tainting of evidence by not raising it on direct appeal and that he failed to show cause and prejudice to excuse the default because counsel had pursued the issue during cross-examination. Reasonable jurists would not debate the district court's ruling on this issue.

Accordingly, Hough's application for a COA is **DENIED**, and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:06-CR-39-JHM

UNITED STATES OF AMERICA, **Plaintiff,**

v.

REGINALD HOUGH, **Defendant.**

ORDER

The Court having accepted the Report and Recommendation of the Magistrate Judge, and the Court being sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is **DENIED with prejudice**.

IT IS FURTHER ORDERED that a certificate of appealability is denied for the reasons set forth in the Magistrate Judge's Report and Recommendation.

This is a final judgment, and there is no just cause for delay in its entry.

Joseph H. McKinley, Jr., Chief Judge
United States District Court

March 20, 2017

cc: Counsel of record
Petitioner, *pro se*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:06-CR-39-JHM

UNITED STATES OF AMERICA, **Plaintiff,**

v.

REGINALD HOUGH, **Defendant.**

ORDER

The Court having reviewed the report and recommendation of the Magistrate Judge, and objections having been filed, **IT IS HEREBY ORDERED** that the Court **ADOPTS** the report and recommendation of the Magistrate Judge in its entirety.

Joseph H. McKinley, Jr., Chief Judge
United States District Court

March 20, 2017

cc: Counsel of record
Petitioner, *pro se*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:06-CR-39-JHM

REGINALD HOUGH, **Petitioner,**

v.

UNITED STATES OF AMERICA, **Respondent.**

FINDINGS OF FACT CONCLUSIONS OF LAW AND RECOMMENDATION

Petitioner Reginald Hough ("Hough") has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DN 198, 203). Hough is acting *pro se*. The United States filed a response in opposition, and Hough filed a reply (DN 207, 208). This matter is now ripe for review. For the following reasons, the undersigned Magistrate Judge recommends that the Court **deny** Hough's petition for post-conviction relief.

FINDINGS OF FACT

On April 18, 2005, Hough's then-wife, Rhonda Hough (known by the time of trial as Rhonda Maurer and referred to herein as "Maurer") contacted the Crimes Against Children Unit ("CACU") of the Louisville Metro Police Department ("LMPD") and stated that she had found child pornography on her husband's desktop computer. At trial, Maurer testified that a few weeks earlier, she found images of child pornography on the computer and confronted Hough about it, but she did not contact the police at that time. Maurer testified that only she and Hough had access to and used the computer. She further testified that on the evening of April 17, 2005, she found additional images of child pornography, and that she contacted LMPD CACU the following morning, April 18, 2005.

Later on the same day, at approximately 4:20 p.m., LMPD executed a search warrant (issued by a Kentucky state court) at Hough and Maurer's residence. Four law enforcement officers, all of the LMPD, were present: (1) Sergeant Jayme Schwab;[1] (2) Detective Leigh Kemper; (3) Detective Jerry Thornsberry; and (4) Detective Kevin Lamkin. Maurer was the only person at home at the time that officers executed the warrant. The computer was on when the officers arrived. The officers permitted Maurer to attempt to show them the images that had prompted her to call the police. She was on the computer for approximately five minutes; she did not access the Internet or add or delete any material. Maurer was unable to locate images of child pornography at that time. LMPD seized the desktop computer, some floppy disks, a laptop computer, and a digital camera.

Maurer telephoned Hough and asked him to come home. She did not notify him of the presence of law enforcement at the residence. Detectives Thornsberry and Lamkin left the scene, taking the items seized with them, while Sergeant Schwab and Detective Kemper remained at the residence with Maurer. When Hough arrived at home, the officers informed him of the execution of the search warrant and asked if he would be willing to go to the CACU offices for an interview. Hough agreed. He drove his own car to the CACU offices after stopping for food at McDonald's. Sergeant Schwab gave Hough some time to eat in a small interview room before he and Detective Kemper entered the room. Before beginning an interrogation, the officers presented Hough with a notice of his *Miranda* rights. Hough signed a waiver of rights portion of the form, and Sergeant Schwab and Detective Kemper signed the form as witnesses. During the interrogation, Hough stated that only he and Maurer had access to and used the desktop

[1] At the time of Hough's arrest, Schwab was a detective. By the time of trial, he had been promoted to sergeant. (DN 179 at 68.)

computer, with the exception of infrequent use by Maurer's son's wife. Hough stated that he sent, by email, *non*-pornographic images of young girls to an individual in England who he met in a chat room, and that the individual sent back a pornographic video or videos of a young girl. Hough stated that he deleted the video(s). Hough insisted that while he did have pornography on his computer, the individuals depicted were all adults. He stated that he had no recollection of sending or receiving child pornography other than the video(s) from the individual in England.

Detective Lamkin, an LMPD computer forensic detective, conducted a preliminary analysis of the desktop computer seized from Hough's residence on the date that he was arrested, April 18, 2005, using a computer program called "Encase." During the preliminary analysis, Detective Lamkin located images of suspected child pornography on the computer's unallocated space. He described materials in unallocated space as having been deleted, but that enough information remained that a forensic review could reveal the webpage that the individual using the computer viewed. Detective Lamkin provided the information recovered in the preliminary review to Sergeant Schwab and Detective Kemper, and they used it in the course of their questioning of Hough.

In 2007, Detective Lamkin conducted additional examinations of the computer, specifically, the Internet history and a program called GoBack that had been installed on the computer prior to Hough's arrest. That examination revealed a total of 189 still images of child pornography; it did not recover any videos involving child pornography. Those images were also found in the computer's unallocated space; no images or videos of child pornography were found in active files. At trial, the United States also elicited testimony from Detective Lamkin

regarding chats between Hough and other individuals and Internet searches by Hough that revealed an interest in child pornography.

Hough was arrested on state charges in April 2005. On March 6, 2006, Hough was indicted by a federal grand jury on one count of possession of child pornography. (DN 1.) On February 20, 2008, a federal grand jury returned a superseding indictment alleging one count of attempting to receive child pornography in violation of 18 U.S.C. § 2252(a)(2)(A), and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(5)(B). (DN 62.) Hough's case proceeded to a three-day jury trial beginning on September 27, 2011 and ending on September 29, 2011. (*See* DN 178, 179, 180 (trial transcripts).) The jury found Hough guilty of both charges in the superseding indictment. (DN 161.) On December 13, 2011, United States District Judge Jennifer B. Coffman sentenced Hough to 210 months' imprisonment, to be followed by a lifetime of supervised release. (DN 173.)

Hough later appealed his conviction and sentence to the United States Court of Appeals for the Sixth Circuit. On February 13, 2013, the Sixth Circuit[2] issued an order (DN 188) -- designated as not recommended for full-text publication -- affirming his conviction and sentence. The grounds raised by Hough on appeal and rejected by the Sixth Circuit were as follows: (i) that the district court erred in denying his motion to suppress based on a violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966); (ii) that the district court erred in granting a motion in limine by the United States to exclude anticipated hearsay testimony of two individuals that Hough's ex-wife told them that she set up Hough; (iii) that the district court erred in denying his motion for judgment of acquittal based on insufficient evidence as to all of the elements of the

[2] The panel that decided Hough's appeal consisted of Sixth Circuit Judges Jeffrey Sutton and Bernice Donald and District Judge for the Northern District of Ohio Peter Economus, sitting by designation. (DN 188 at 1, n.1.)

crimes for which he was convicted; (iv) that the 210-month sentence was procedurally unreasonable because the Sentencing Guideline upon which the sentence is based is not rooted in empirical data and because the district court did not recognize its authority to depart from the Guidelines; and (v) that the sentence was substantively unreasonable because the district court did not implement a downward departure as a result of Hough's relatively advanced age (63) and good employment record. (*See generally* DN 188.)

On April 11, 2014, Hough filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence (DN 198). Before the time for the United States to file a response to the Section 2255 petition had elapsed, Hough filed a motion for leave to file a memorandum of law in support of the petition (DN 201). The Court granted the motion (DN 204), and on June 16, 2014, Hough filed a memorandum in support of his habeas petition (DN 203). On July 21, 2014, the United States filed a response in opposition (DN 207), and Hough filed a reply on August 11, 2014 (DN 208). Hough asserts nine grounds for relief. Each of those grounds is addressed in the "Conclusions of Law" section below.

CONCLUSIONS OF LAW

A. Legal Standard

To obtain habeas relief under 28 U.S.C. § 2255, a federal prisoner must demonstrate that his "sentence was imposed in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack . . . ." 28 U.S.C. § 2255(a); *see United States v. Doyle*, 631 F.3d 815, 817-18 (6th Cir. 2011) ("A motion brought under § 2255 must allege one of three bases as a threshold standard: (1) an error of

constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid.") (quoting *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001) (internal citation omitted)).

A Section 2255 petitioner is procedurally barred from raising an issue in a habeas proceeding where he or she previously raised or could have raised the issue on direct appeal. The Sixth Circuit has consistently held that a Section 2255 motion may not be used to re-litigate an issue that was raised on appeal absent highly exceptional circumstances, such as an intervening change in the law. *Dupont v. United States*, 76 F.3d 108, 110 (6th Cir. 1996) (collecting cases). Additionally, "[w]here a defendant has procedurally defaulted on a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citing *Murray v. Carrier*, 477 U.S. 478, 485, 496 (1986), *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), and *Smith v. Murray*, 477 U.S. 527, 537 (1986)). Notably, under the cause and prejudice test, "cause" must be something that cannot be fairly attributed to the movant. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (abrogated in part on other grounds in *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012)).

In this case, Hough appears to link all of his asserted grounds for relief to an underlying argument that he received ineffective assistance of counsel at the trial level. In the framework of the three avenues for relief available pursuant to Section 2255, a claim of ineffective assistance of counsel falls under the "error of constitutional magnitude" prong. Specifically, the Sixth Amendment guarantees a criminal defendant the right to "the assistance of counsel for his defense." U.S. Const. Amend. VI. As with any other constitutional claim raised in a Section

2255 proceeding, the petitioner bears the burden of proving, by a preponderance of the evidence, a Sixth Amendment violation due to ineffective assistance of counsel. *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006); *United States v. Pierce*, 62 F.3d 818, 833 (6th Cir. 1995). Conclusory allegations or bare bones statements regarding counsel's effectiveness fall short of meeting that burden. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000) (finding that "conclusory statement" by petitioner was "wholly insufficient to raise the issue of ineffective assistance of counsel"). An evidentiary hearing on a Sixth Amendment claim of ineffective assistance of counsel will not be required if "the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or are conclusions rather than statement of fact." *Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007).

This Sixth Amendment right entitles a defendant not only to counsel, but to counsel that is reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A claim of ineffective assistance of counsel requires the petitioner to show that [1] counsel's performance was deficient and [2] that the deficiency prejudiced him." *Id.* at 687. To satisfy this first prong of the *Strickland* test, the petitioner must "show[] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* "Counsel's performance is deficient if it fell below an objective standard of reasonableness" based on "prevailing professional norms." *Id.* at 688. A petitioner asserting a claim of ineffective assistance must, consequently, "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 688. The Court is required to evaluate the objective reasonableness of counsel's performance "from counsel's perspective at the time of the alleged error and in light of all of the circumstances."

Kimmelman v. Morrison, 477 U.S. 365, 381 (1986). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689; *see id.* ("Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'") (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Under the second *Strickland* prong, the petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Moss v. United States*, 323 F.3d 445, 454 (6th Cir. 2003) (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

At some points in his supporting memorandum, Hough appears to argue that his appellate counsel provided ineffective assistance. Where a petitioner raises a claim of ineffective assistance by appellate counsel, the two-pronged *Strickland* test still applies. *Valentine v. United States*, 488 F.3d 325, 338 (6th Cir. 2007) (citing *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004)). "In the appellate context, the court must first assess the strength of the claim appellate counsel failed to raise." *Id.* "Counsel's failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal." *Id.* (quoting *McFarland*, 356 F.3d at 699). As the Sixth Circuit reasoned in *McFarland*, "[i]f there is a reasonable probability that [the petitioner] would have prevailed on appeal had the claim been raised, we can then consider whether the claim's

merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel." *McFarland*, 356 F.3d at 700.

B. Grounds for Relief Asserted by Hough

The Court will address each of the grounds for relief asserted by Hough in the order in which they appear in his petition and supplemental memorandum. (DN 198, 203.)

1. Alleged Improper Expert Testimony of Detective Lamkin

In Ground 1, Hough asserts that his Fifth and Sixth Amendment rights were violated when Detective Lamkin provided what Hough contends was expert testimony when Lamkin was a lay witness. (DN 198 at 4.) Hough argues that Detective Lamkin became a de facto expert when he provided (a) opinion testimony, and (b) technical, scientific testimony. (*Id.*) Hough contends that his trial counsel and appellate counsel were at fault for not pursuing this argument at trial or on appeal. (*See* DN 198 at 5-6; DN 203 at 8-11.)

In response, the United States argues that a review of the trial transcript contradicts Hough's arguments. The United States responds that it represented at trial that Detective Lamkin would not provide opinion testimony, and that the trial court ensured that no opinion testimony was given. (DN 207 at 7-8.) As to Hough's argument that Detective Lamkin provided training based on his technical, scientific expertise, the United States responds that it gave notice that it intended to call Detective Lamkin to provide testimony based on his specialized training and skill in the area of computer forensic examination and provided copies of his written reports to defense counsel. (*Id.*) It further argues that defense counsel thoroughly cross-examined Detective Lamkin, at times using the written reports that he prepared and that were served on defense counsel during discovery. Finally, the United States contends that there was no viable

claim for relief based on Detective Lamkin's testimony, and therefore, Hough's appellate counsel did not err by failing to raise the issue with the Sixth Circuit. (*Id.*)

In his reply, Hough provides a list of instances in which he claims that Detective Lamkin provided opinion testimony despite the United States' assurances that he would not do so. He contends that his trial and appellate counsel were ineffective by virtue of not raising this issue at trial and on direct appeal. (DN 208 at 5-6.)

In considering Hough's arguments regarding Detective Lamkin's testimony, it is critical to remember that the Federal Rules of Evidence are concerned with expert and lay *testimony*, as opposed to expert and lay *witnesses*. *See* Fed. R. Evid. 701 advisory committee's notes (2000) ("The [2000] amendment [to Rule 701] does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*.") (emphasis added). "Certainly it is possible for the same witness to provide both lay and expert testimony in a single case." *Id.* (citing *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997)). We will bear in mind this preliminary point when addressing Hough's dual arguments regarding Detective Lamkin's testimony.

Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure requires the government, at the defendant's request, to provide a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial -- that is, the Rules governing expert witness testimony. *See* Fed. R. Crim. P. 16(a)(1)(G). Rule 701 provides that "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of

the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.[3] Fed. R. Evid. 701.

As is set forth above, Hough has challenged Detective Lamkin's testimony on two grounds -- that he improperly offered opinion testimony and that he offered testimony based on scientific, technical, or other specialized knowledge. The Court will address each argument in turn. First, the Court has carefully reviewed the official transcript of Detective Lamkin's testimony and finds that he *did not* offer opinion testimony in violation of Rule 701. Detective Lamkin testified at length at trial and was subjected to vigorous cross-examination by Hough's counsel. The United States stated near the start of Detective Lamkin's testimony that he would not be providing opinion testimony. (*See* DN 179 at 157 ([Government counsel during bench conference:] "I'm not going to be eliciting any opinions from Detective Lamkin.").) Counsel for Hough acknowledged this approach. For example, in a bench conference, counsel for the United States stated, "He will only refer to the images as suspected child pornography. He's not going to offer any kind of an opinion." (*Id.* at 157.) Defense counsel affirmed, "And that's my understanding." (*Id.*) The trial court, the United States, *and* Hough's attorney were cognizant of confining Detective Lamkin's testimony to those parameters. For example, when Detective Lamkin testified that Hough's computer contained "an image of a girl that appears under 18

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[3] Rule 702 provides as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

years old in sexual activity," defense counsel objected that the statement constituted opinion testimony, and the Court instructed the members of the jury to disregard the statement because it was an opinion. (*See id.* at 204-06.)

With respect to the other instances of alleged opinion testimony that Hough includes in his reply, the Court finds that those instances were either permissible based on Detective Lamkin's specialized knowledge -- which is addressed below -- or that defense counsel may have simply exercised his discretion as to how to deal with an opposing witness. Defense counsel has discretion as to when to object to an opposing witness's testimony and when to remain silent; indeed, in this case, defense counsel subjected Detective Lamkin to a lengthy, pointed cross-examination. To the extent that Detective Lamkin made uncontested statements of opinion on direct or re-direct examination, defense counsel may simply have determined that it would be more effective to attack Detective Lamkin on cross-examination or re-cross rather than to object in the moment.

Second, Hough contends that Detective Lamkin offered technical, scientific testimony based on his specialized knowledge as a computer forensic examiner, and that this was impermissible because he was a lay witness bound by the terms of Rule 701. The Court acknowledges that neither the trial transcript nor the United States' response brief is as clear as would be desired on this point. However, the Court concludes that Detective Lamkin's technical, scientific testimony was permissible in the context of this case. During a bench conference early in Detective Lamkin's testimony, counsel for the government stated, "I'm not going to be eliciting any opinions from Detective Lamkin. I give notice under the 700 series and in Rule 16 that he is going to testify based on specialized training but not offering an opinion."

(Tr. 179 at 157.) This amounted to notice of the United States' intention for Detective Lamkin to offer *expert testimony* regarding his specialized training and experience in the area of computer forensics, *and* factual, *lay testimony* regarding other aspects of the investigation of Hough. *See* Fed. R. Crim. P. 16(a)(1)(G) (requiring government to provide, at defendant's request, written summary of testimony that it intends to use in case-in-chief under Rules of Evidence 702, 703, or 705).

Additionally, the United States provided to Hough's counsel copies of the report or reports that Detective Lamkin had prepared in this case; the reports constituted written summaries of his expected testimony for purposes of Rule 16. (*See* DN 207 ("The United States gave notice of its intent to call Detective Lamkin to provide testimony based on his specialized training and skill in the area of computer forensic examination and provided copies of his written reports to defense counsel.").) Indeed, the United States used the written reports in its direct examination of Detective Lamkin, and defense counsel used the reports in cross-examining Detective Lamkin as to his application of his specialized skill and training in conjunction with his forensic analysis of Hough's computer. (*See, e.g.*, DN 179 at 184 (Q: How is this part of the report different from the other part? A: Created that other part just to show websites with search terms. This document is just the web pages altogether that pertain to suspected child pornography.); *id.* at 257-58 (Q: When was it that this computer was accessed; the Hough computer, that is, as reflected here in your report? A: That's on the -- reflected on the index.dat. It looks like the 4:11 p.m. is the last accessed.).) Counsel pressed Lamkin on (among other things) his education and training, Maurer's use of the computer after the arrival of the officers executing the search warrant, and a number of chain-of-custody issues. (*See, e.g.*, DN 179 at

227-228 (regarding education); *id.* at 233-35 (regarding Maurer's use of computer); *id.* at 240 (regarding others' access to items seized).)

The Court notes that Hough has raised an important point regarding the overlap between lay and expert testimony, particularly where the witness has both specialized knowledge and factual information regarding the investigation underlying the criminal charges. "In 2000, the drafters amended Rule 701 to foreclose lay witness testimony 'based on scientific, technical, or other specialized knowledge' -- testimony more properly given by a qualified expert." *United States v. White*, 492 F.3d 380, 400 (6th Cir. 2007). "In amending the Rule, the drafters intended to preclude a party from surreptitiously circumventing 'the reliability requirements set forth in Rule 702 . . . through the simple expedient of proffering an expert in lay witness clothing' and to 'ensure[] that a party will not evade the expert witness disclosure requirements set forth in . . . Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson.'" *Id.* at 400-01 (quoting Fed. R. Evid. 701 advisory committee's notes (2000)). The Sixth Circuit has acknowledged that "[t]he distinction [between lay and expert testimony] is far from clear in cases where, as here, a witness with specialized or technical knowledge was also personally involved in the factual underpinnings of the case." *Id.* (citations omitted). Accordingly, Hough is justifiably concerned about the specter of Detective Lamkin providing testimony based on his technical or specialized knowledge without being designated an expert. However, as the Court found above, while it may not have been done as expressly as desired, the United States *did* explain on the record that Detective Lamkin would not be providing opinion testimony, but he *would* be providing expert testimony based on his specialized training and skills, *and* that the United States met its disclosure obligations under Rule 16.

Taking into consideration the foregoing analysis, the Court concludes that Hough has not met *Strickland*'s exacting two-pronged standard for a claim of ineffective assistance of counsel. First, Hough has not shown that counsel's performance fell below an objective standard of reasonableness such that Hough was deprived of his Sixth Amendment right to counsel. *See Strickland*, 466 U.S. at 688. As is discussed above, trial counsel employed a careful, lengthy cross-examination of Detective Lamkin regarding the full range of Lamkin's involvement in the investigation. The cross-examination covered both Detective Lamkin's fact-based, non-opinion lay testimony *and* his technical, specialized expert testimony. As the Supreme Court stated in *Strickland*, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. To the extent that defense counsel did not object to each and every instance of possible opinion testimony, or to the extent that counsel could have argued that the United States did not set forth as clearly as possible its intended use of Detective Lamkin as a witness straddling the lay-expert line, the Court finds that Hough's arguments fall significantly short of meeting his burden of showing that counsel's actions were objectively unreasonable. To the contrary, the Court views counsel's cross-examination of Detective Lamkin as skilled and hard-hitting. As Hough has not met the first *Strickland* prong with respect to Ground 1, the Court need not look to the second prong, whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694.

Finally, as the Court has concluded that Hough's claim as to ineffective assistance of trial counsel fails, his argument regarding appellate counsel necessarily fails as well. A failure by counsel to raise an issue on appeal can only be ineffective assistance if there is a reasonable

probability that inclusion of the issue would have changed the result of the appeal. *Valentine*, 488 F.3d at 338.

Based on the foregoing, the Court recommends that Hough's Section 2255 petition be denied as to Ground 1.

2. Failure to File Motion to Suppress

In Ground 2, Hough alleges that his trial counsel provided ineffective assistance by failing to file motions to suppress in relation to his arrest and the search of his residence. He contends that the search warrant was invalid in that it was not based on probable cause. (DN 203 at 12-13.) Specifically, he argues that the search warrant application relied entirely upon conclusory statements by Maurer as to what she found on the desktop computer and a statement that Hough was a registered sex offender in the state of Indiana. (*Id.*) He further argues that to the extent that probable cause existed, it dissipated when, after the executing officers arrived at the residence, Maurer did not find the materials that she claimed to have seen on the computer. (DN 208 at 8.)

In response, the United States argues that, viewing the search warrant application as a whole and considering the totality of the circumstances, there was sufficient basis for the Jefferson Circuit Court to determine that probable cause existed. The United States notes that the search warrant application identified the source of the information upon which the affiant relied, that is, Hough's then-wife, Maurer, and it described the materials that Maurer claimed to have observed on the computer. The United States further notes that the application confirmed that Hough was a registered sex offender in Indiana. The United States contends that trial counsel made a strategic decision to forego pursuing a motion to suppress on the ground that the

search warrant affidavit was "bare bones," and that the circumstances set forth in the second ground of the Section 2255 petition do not establish a basis for habeas relief. (DN 207 at 8-11.) In his reply, Hough focuses on his argument that even if probable cause existed at the time the warrant issued, it dissipated when Maurer could not locate the alleged child pornography on the desktop computer after the officers arrived. (DN 208 at 6-8.)

In order to determine whether trial counsel provided ineffective assistance by not moving to suppress evidence derived from execution of the search warrant, the Court must first consider whether the search warrant was supported by probable cause. The Fourth Amendment requires probable cause for a search warrant to issue. *United States v. Laughton*, 409 F.3d 744 (6th Cir. 2005) (citing U.S. Const. amend. IV; *United States v. Helton*, 314 F.3d 812, 819 (6th Cir. 2003)). An issuing judge may find probable cause to issue a search warrant when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 747 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). In making this determination, the issuing judge must undertake a "practical, common sense" evaluation of "all of the circumstances set forth in the affidavit before him." *Id.* (quoting *Gates*, 462 U.S. at 238). "In making this practical, common sense determination, the issuing judge must look for certain criteria." *United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008). "First, the affidavit or warrant request 'must state a nexus between the place to be searched and the evidence sought.'" *Id.* (quoting *United States v. Bethal*, 245 Fed. Appx. 460, 464 (6th Cir. 2007) (unpublished decision)) (additional quotations omitted); *see United States v. Greene*, 250 F.3d 471, 479 (6th Cir. 2001) ("Probable cause exists where there is a fair probability, given the totality of the circumstances, that contraband or evidence of a crime will be found in a particular place.") (internal quotations

omitted). "Second, '[t]he belief that the items sought will be found at the location to be searched must be "supported by less than prima facie proof but more than mere suspicion."'" *Id.* (quoting *Bethal*, 245 Fed. Appx. at 464 (quoting *United States v. Johnson*, 351 F.3d 254, 258 (6th Cir. 2004) (quoting *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990)))).

Both the issuing judge and the reviewing court should take a totality of the circumstances approach in their review of the affidavit, rather than scrutinize the affidavit line-by-line. *Williams*, 544 F.3d at 686 (citations omitted). "[C]ourts may afford 'considerable weight to the conclusion of experienced law enforcement officers regarding where evidence of a crime is likely to be found and [courts are] entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the crime and the type of offense." *Id.* (quoting *Bethal*, 345 Fed. Appx. at 465; citing *United States v. Allen*, 211 F.3d 970, 973 (6th Cir. 2000) (quoting *Gates*, 462 U.S. at 246 n.14)). It is important to remember that "an affidavit for search warrant 'is judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added.'" *United States v. Jeffries*, 2008 U.S. Dist. LEXIS 1395, *10-11 (W.D. Ky. Jan. 8, 2008) (citing *United States v. Pinson*, 321 F.3d 558, 561 (6th Cir. 2003)). "There need only be sufficient facts for the magistrate to find, based on the totality of the circumstances, that there was probable cause for the search." *Id.* at *11 (citing *Pinson*, 321 F.3d at 565).

"An affidavit lacks the requisite indicia of probable cause if it is a 'bare-bones affidavit,'" as Hough describes the affidavit supporting the search warrant in this case. *United States v. Rose*, 714 F.3d 362, 367 (6th Cir. 2013) (citing *United States v. Laughton*, 409 F.3d 744, 748 (6th Cir. 2005) (citation omitted)). "The bare-bones inquiry requires examination of the affidavit

for particularized facts that indicate veracity, reliability, and basis of knowledge and that go beyond bare conclusions and suppositions." *Id.* (citing *Laughton*, 409 F.3d at 748).

In reviewing the sufficiency of the evidence supporting probable cause, "great deference" is accorded to the issuing judicial officer's determination. *United States v. Burney*, 778 F.3d 536, 540 (6th Cir. 2015). "[T]he task of a reviewing court is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *United States v. Martin*, 2015 U.S. Dist. LEXIS 75030, *6 (E.D. Tenn. Mar. 25, 2015) (quoting *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984)).

The search warrant affidavit in this case provided as follows:

> Rhonda Hough [Maurer] contacted the Crimes Against Children office to advise that while looking at e-mail on the computer located at the residence she shares with her husband, Reginald Hough, she discovered numerous still images of child pornography and at least 8 video images of children engaged in sexual acts electronically stored on the computer. Ms. Hough [Maurer] also discovered screen names of Hoosier_Daddy33@hotmal.com and Reggie467@yahoo.com that had been used to proposition a 15 year old female for the purposes of sexual activity and/or child pornography. Ms. Hough [Maurer] saw the e-mails and images as recently as 0930 AM on 04-18-2005.

(DN 203-1 at 2.) The affidavit further provides that, "Acting on the information received, [the] affiant conducted the following independent investigation: Verified the existence of the suspect as a registered sex offender in Indiana for the charge of sexual abuse." (*Id.*) The search warrant was issued and executed on the same day noted at the end of the paragraph reproduced above, April 18, 2005.

The Sixth Circuit has "clearly held that a known informant's statement can support probable cause even though the affiant fails to provide any additional basis for the known informant's credibility and the informant has never provided information to the police in the past." *United States v. Kinison*, 710 F.3d 678, 682-83 (6th Cir. 2013) (citing *United States v. Miller*, 314 F.3d 265, 270 (6th Cir. 2002) ("The simple fact is that the informant, Haas, was named in the affidavit in question. Sheriff Fee spoke to Haas on two occasions over the telephone. Shortly after one of those calls, Sheriff Fee and Haas drove together to the location of Miller's mobile home . . . . Moreover, with Haas's identity secured, Haas himself was subject to prosecution if this information was fabricated.")). In this case, the affiant relied exclusively on the information provided by Maurer, Hough's then-wife and co-resident of the apartment. This is a decidedly intimate relationship that lends credibility to Maruer's statements. Moreover, the affidavit clearly provided that Maurer's discovery of child pornography on the computer used by Hough had occurred in the immediate past; there was no gap in time between the discovery of criminal activity and contact with police that might have lessened the impact of the information that Maurer provided or weakened her credibility. Additionally, as the Sixth Circuit has noted, a known informant opens herself up to prosecution for making false statements to authorities. *See Kinison*, 710 F.3d at 683. In this case, Maurer made her name, address, and the name of her spouse known at the time that she contacted law enforcement. She also provided specific details, including the number of alleged images and videos depicting child pornography that she had seen, as well as Hough's email addresses.

As for Hough's argument that the affidavit was "bare-bones," it is true that the affiant provided one short paragraph of information. However, as is described above, the information

was provided by a known informant and included a strong degree of specificity as to the alleged criminal activity. The Court concludes that the affidavit contained "particularized facts that indicate[d] veracity, reliability, and basis of knowledge that go beyond bare conclusions and suppositions." *Rose*, 714 F.3d at 367 (citing *Laughton*, 409 F.3d at 748). Accordingly, Hough's argument that the affidavit was bare-bones fails.

With respect to the affiant's statement that he had verified that Hough was a registered sex offender in Indiana in relation to sexual abuse, the statement appears to have been included in the affidavit as a statement of the fruit of the affiant's investigation following Maurer's call. While that statement may weigh in favor of a finding of probable cause based on totality of the circumstances known to the issuing magistrate judge at the time the warrant was issued, the Court finds that probable cause did not depend on that statement. The Court notes that the Sixth Circuit cases upon which Hough relies on this point are distinguishable in that they concluded that probable cause did not exist *solely* based on a purported nexus between sexual abuse and propensity for possession of child pornography. *Cf. United States v. Hodson*, 543 F.3d 286, 293 (6th Cir. 2008) ("[W]e conclude that it was unreasonable for the officer executing the search warrant in this case to believe that probable cause existed to search Hodson's computers for child pornography based *solely* on a suspicion -- albeit a suspicion triggered by Hodson's computer use -- that Hodson had engaged in child molestation."); *see id.* at 293, 293 n.4 (reiterating that high incidence of child molestation by persons convicted of child pornography crimes may not demonstrate likelihood of possession of child pornography) (citing *United States v. Adkins*, 169 F. App'x 961, 967 (6th Cir. 2006)). In this case, the affiant discovered Hough's sex-offender

status *after* receiving the information from Maurer, and that status was not the sole -- or even a primary -- basis for the suspicion of possession of child pornography.

Hough contends that to the extent that probable cause existed at the time that the search warrant was issued, probable cause dissipated when Maurer could not locate for the executing officers the child pornography that she claimed to have discovered. The Court disagrees. As is set forth above, the probable cause inquiry looks to the totality of the information known to the issuing magistrate judge at the time that he or she is presented with a warrant application. *See Greene*, 250 F.3d at 479 ("Probable cause exists where there is a fair probability, given the totality of the circumstances, that contraband or evidence of a crime will be found in a particular place."). The fact that Maurer did not locate the pornographic images and videos that she claimed to have seen did not negate the probable cause that existed at the time that the warrant issued. *See, e.g.*, *United States v. Watkins St. Project*, 2010 U.S. Dist. LEXIS 143271, *43-44 (E.D. Tenn. Oct. 28, 2010) (reasoning that disagreement regarding testing of one sample for asbestos and subsequent negative testing result as to the sample did not dissipate probable cause as to other samples that did test positive for asbestos); *United States v. Conerly*, 2010 U.S. Dist. LEXIS 120410, *13-14 (E.D. Mich. Oct. 8, 2010) (in context of vehicle search, concluding that driver handing marijuana cigarette to officer did not dissipate probable cause under circumstances and that logically, additional marijuana or other evidence of marijuana possession could have remained in vehicle).

Turning now to the "ineffective assistance" aspect of Ground 2, the Court must reject Hough's argument that his trial counsel provided ineffective assistance by failing to move for suppression of the evidence recovered from the search of his residence. The Court concludes

that probable cause existed that evidence of criminal activity would be present in Hough's residence. It was objectively reasonable for Hough's trial counsel *not* to have filed a motion for summary judgment in relation thereto. Moreover, as the United States points out, Hough's attorney filed a motion to suppress the statement that Hough provided to authorities. (*See* DN 137; DN 152 (denying motion to suppress statements).) Pursuant to *Strickland*, this Court must be highly deferential in its review of the tactical decisions made by Hough's trial counsel. Based on the record before the Court, there is no basis to conclude that counsel's performance was deficient when he chose not to file a motion to suppress based on a lack of probable cause to support the search warrant. Accordingly, the *Strickland* standard is unmet in relation to Ground 2.

Based on the foregoing, the Court recommends that Hough's Section 2255 petition be denied as to Ground 2.

3. Alleged False Statements in Search Warrant Affidavit

Ground 3 relates to alleged false statements by LMPD investigators. Hough claims that trial counsel was ineffective because he failed to challenge the veracity of the search warrant application affiant with respect to statements that they claimed Maurer made, and also because counsel did not challenge material omissions by LMPD. (DN 198 at 7-8.) Hough contends that Maurer's trial testimony and the results of the forensic search of his computer demonstrate the falsity of the search warrant application statement that she saw illegal images or videos in Hough's email. (DN 203 at 16-17.)

In response, the United States argues that there is no evidence in the record that the affiant misrepresented information provided to police by Maurer. The United States contends

that a petitioner's right to a *Franks* hearing, which Hough seeks in Ground 3, relates to false information provided by an affiant, not to information contained in an affidavit that is attributed to another person. The United States also states that defense counsel subjected Maurer to rigorous cross-examination regarding the information that she provided to LMPD, and as such, Hough received effective assistance of counsel. (DN 207 at 11-12.) In reply, Hough maintains that he is entitled to an evidentiary hearing because,LMPD officers acted recklessly in relation to the information provided in the search warrant. (DN 208 at 8-9.)

Ground 3 raises the question of whether Hough was entitled to an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). In *Franks*, the Supreme Court established the standard for when a district court is required to conduct an evidentiary hearing regarding the validity of an affidavit supporting a search warrant. "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." 438 U.S. at 171. The Supreme Court further stated as follows:

> There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons . . . [I]f these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.

Id. at 171–72; *see also United States v. Green*, 572 Fed. App'x 438, 441 (6th Cir. 2014) ("A defendant is entitled to a *Franks* hearing if he (1) 'makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was

included by the affiant in the warrant affidavit,' and (2) 'the allegedly false statement is necessary to the finding of probable cause."') (quoting *United States v. Graham*, 275 F.3d 490, 505 (6th Cir. 2001).). The Sixth Circuit has stressed the loftiness of the *Franks* standard:

> A defendant who challenges the veracity of statements made in an affidavit that formed the basis for a warrant has a heavy burden. His allegations must be more than conclusory. He must point to specific false statements that he claims were made intentionally or with reckless disregard for the truth. He must accompany his allegations with an offer of proof. Moreover, he also should provide supporting affidavits or explain their absence.

United States v. Bennett, 905 F.2d 931, 934 (6th Cir. 1990) (internal citations omitted).

As is set forth above in the discussion of Ground 2, the affidavit provided as follows:

> Rhonda Hough [Maurer] contacted the Crimes Against Children office to advise that while looking at e-mail on the computer located at the residence she shares with her husband, Reginald Hough, she discovered numerous still images of child pornography and at least 8 video images of children engaged in sexual acts electronically stored on the computer. Ms. Hough [Maurer] also discovered screen names of Hoosier_Daddy33@hotmal.com and Reggie467@yahoo.com that had been used to proposition a 15 year old female for the purposes of sexual activity and/or child pornography. Ms. Hough [Maurer] saw the e-mails and images as recently as 0930 AM on 04-18-2005.

(DN 203-1 at 2.) Hough argues that Maurer's trial testimony established that the affidavit contained false statements, namely, that Maurer testified that she did not report anything regarding the content of Hough's emails; that no videos were located on his computer; and that all images identified as child pornography were found in the computer's unallocated space and not in his email. (DN 203 at 17.) Hough contends that based on Maurer's testimony, it is clear that the search warrant affidavit contained false statements, and that his counsel provided ineffective assistance by failing to seek a *Franks* hearing. (*Id.*)

The Court finds that under the circumstances, Hough has not shown that he would have been entitled to a *Franks* hearing if his trial counsel had sought one. As the United States emphasizes, Hough's argument is based on a premise that *Maurer* provided false or inaccurate information when she contacted law enforcement, and that the affiant relied on that information when he applied for a search warrant. Critically, Hough does not contend that the *affiant* -- intentionally or with substantial disregard for the truth -- provided false information in the search warrant application. As is discussed at length above in relation to Ground 2, Maurer was a known individual who approached law enforcement officials of her own volition to provide information regarding suspected criminal activity by her spouse and co-resident of an apartment; she claimed that the criminal activity took place using a computer that she and Hough shared and that she had observed it in the very recent past. It was therefore appropriate for the affiant to rely upon Maurer's statements in preparing the search warrant application. There is nothing in the record that would suggest that the affiant had any reason to believe that Maurer provided false or misleading information at the time that the search warrant application was prepared and submitted. To that end, Hough relies upon Maurer's testimony, given on September 27, 2011, nearly five and a half years after issuance of the search warrant on April 18, 2005, to support his argument that the search warrant contained false statements by Maurer. He does not point to any information in the record that should have led his counsel to argue that a *Franks* hearing was warranted at some date prior to trial.

Hough simply does not support his position that his counsel should have sought a *Franks* hearing based on an argument that the affidavit contained false information. In short, Hough has not made a substantial preliminary showing that the affiant knowingly and intentionally or with

reckless disregard for the truth included false information in the search warrant affidavit. As the Court concludes that the first *Franks* element is unmet, the Court cannot find that trial counsel provided ineffective assistance sufficient to satisfy *Strickland*'s exacting standard. Counsel made the objectively reasonable decision not to seek a *Franks* hearing. He cross-examined Maurer rigorously, leading to the testimony to which Hough points as evidence that the information in the search warrant affidavit was inaccurate, and leaving to the jury the question of Maurer's credibility as a witness.

Based on the foregoing, the Court recommends that Hough's Section 2255 petition be denied as to Ground 3.

4. Use of Officer Kemper's Statements on Video

In Ground 4, Hough argues that his rights under the Sixth Amendment Confrontation Clause were violated when Detective Kemper's video testimony was played at trial, but he did not have an opportunity to cross-examine her. (DN 198 at 9-10; DN 203 at 17-19.) In response, the United States argues that the video to which Hough refers was not testimony at all; rather, it is a digital copy of an interview of Hough that police conducted soon after executing the search warrant. The United States argues that it laid a proper evidentiary foundation for admission of the video through Detective Schwab's testimony, and that the Court admitted the recording in evidence, subject to modifications based on other evidentiary rulings. The United States contends that it sought to introduce the video as a prior statement of Hough and that the officers' questions were not offered for the truth of the matter asserted. The United States further notes that trial counsel moved to suppress the video in its entirety and the trial court denied that

motion, a ruling later affirmed by the Sixth Circuit. The United States argues that neither trial nor appellate counsel provided ineffective assistance. (DN 207 at 12-13.)

In reply, Hough contends that the United States "misses the point" raised by Ground 4. (DN 208 at 9.) He argues that under Supreme Court precedent, statements made in a police interrogation are testimonial in nature, and therefore, his Sixth Amendment rights were implicated when his attorneys failed to object to the use of the video at trial or to raise the issue on appeal. (*Id.* at 9-10.) Hough did not raise this issue on direct appeal. He argues that his attorney provided ineffective assistance by failing to raise the issue at trial. Therefore, he must overcome the demanding *Strickland* standard for ineffective assistance of counsel in order to establish "cause and prejudice" for his failure to raise the issue earlier.

The video at issue in Ground 4 was admitted in evidence during Sergeant Schwab's testimony. (DN 179 at 22.) The video includes portions of the interrogation of Hough after he arrived at the police station on April 18, 2005, limited in accordance with the trial court's evidentiary rulings. The jurors were informed that they would be shown a redacted version of the interview. (*See id.* at 23 (The Court: "Not all portions of a police interview are admissible at trial. Accordingly, I have ruled out certain parts of that video. So you're not going to see every bit of the interview. You're going to see what's relevant and what's admissible at trial.").) Sergeant Schwab and Detective Kemper conducted the interrogation of Hough. (*Id.* at 25 (Schwab identifying participants in interrogation).) Schwab testified at trial; Kemper did not testify at trial and was not available for cross-examination at an earlier time. Hough's argument is that Detective Kemper's questioning of him amounted to testimony and that his Sixth Amendment right to confront witnesses against him was violated when he did not have the

opportunity to cross-examine Detective Kemper. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ." U.S. Const. Amend. VI. While trial counsel did not raise an argument based on the Sixth Amendment's Confrontation Clause, he did file a motion to suppress the recording on the basis of a violation of Hough's rights under *Miranda v. Arizona*. The trial court denied that motion, and the Sixth Circuit upheld that ruling. (*See* DN 188 at 3-4.)

The United States responded to Ground 4 by discussing the evidentiary basis for playing the video, which is that Hough's statements to police were admissible prior statements of an opponent. *See* Fed. R. Evid. 801(d)(2)(A) (A statement is not hearsay when "offered against an opposing party and [] was made by the party in an individual or representative capacity.").) "All that is required for a party opponent's out-of-court statement to be admitted under FRE 801(d)(2)(A) is that the statement 'include some specific fact which tends to establish guilt or some element of the defense.'" *United States v. Thurman*, 915 F. Supp. 2d 836, 850 (W.D. Ky. 2012) (quoting *United States v. Turner*, 995 F.2d 1357, 1363 (6th Cir. 1993) (internal citation omitted)). For example, in another habeas case, *United States v. Henderson*, 626 F.3d 326 (6th Cir. 2010), the Sixth Circuit concluded that audio recordings of the incarcerated defendant speaking on the phone with others were admissible non-hearsay pursuant to Rule 801(d)(2)(A). The Court held that counsel's failure to object to admission of those statements was not deficient because any hearsay objection would have been overruled. *Id.* at 337 (citing *United States v. Jacob*, 377 F.3d 573, 581 (6th Cir. 2004); *United States v. Davis*, 170 F.3d 617, 627 (6th Cir. 1999)). The Sixth Circuit further reasoned that the statements made by other parties to the phone calls were not hearsay because they were admitted to provide context for the defendant's

admissions, not for their truth. *Id.* Based on the foregoing, the Court finds that Hough's statements on the video recording were admissible non-hearsay pursuant to Rule 801(d)(2)(A), and the statements of Sergeant Schwab and Detective Kemper that are also part of the video were offered merely to provide context for Hough's statements and are not hearsay. Accordingly, it was objectively reasonable for Hough's counsel not to have raised a hearsay argument in relation to the video recording, either at trial or on appeal. There is no *Strickland* violation in relation to that issue.

With that said, the Court agrees with Hough that the United States failed to address the key issue raised by Ground 4. As is set forth above, the Sixth Amendment Confrontation Clause guarantees the accused in a criminal prosecution "the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. In the seminal case on the Confrontation Clause, *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the Supreme Court held that the provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." The Supreme Court offered further clarity on the issue of what constitutes a "testimonial" statement in *Davis v. Washington*, 547 U.S. 813 (2006). The *Davis* court noted that "[a] critical portion of this [*Crawford*] holding . . . is the phrase 'testimonial statements,'" and that "[o]nly statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Id.* at 821 (citing *Crawford*, 541 U.S. at 51). In *Davis*, the Supreme Court distinguished between testimonial and nontestimonial statements, as only the former receive protection from the Confrontation Clause. The following excerpt is the oft-quoted distinction established in *Davis*.

> Without attempting to produce an exhaustive classification of all conceivable statements -- or even all conceivable statements in response to police interrogation -- as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

Hough's position is that Detective Kemper's statements during the interrogation were presented to the jurors, who may have viewed her statements as having equal weight to live testimony at trial. He contends that he was denied the right to cross-examine Kemper. This argument makes a certain amount of sense, particularly when reviewing the transcript of Detective Kemper's recorded comments. For the majority of the portions of the interrogation that were shown to the jury, Detective Kemper asks short, open-ended questions or makes small talk with Hough, while Sergeant Schwab takes the lead. (*See, e.g.*, DN 179 at 34 (Detective Kemper asking questions including, "[W]hat did you receive from England?"; "And how many of those video clips did he send you?"; "Did you forward them to anybody else?").) However, at various points later in the interrogation, Detective Kemper makes comments or asks questions that appear to go to the elements of the offenses with which he was charged. (*See, e.g.*, DN 179 at 35 ("Then how are you going to explain all this kiddy porn that shows up on your computer? Cause, like I said, they're -- they're looking at it right now."); *id.* at 38 ("Well, you should [be]cause you've sent -- you're receiving them, and you're forwarding them. I mean [. . .] the

evidence doesn't lie."); *id.* at 57 ("You can tell the difference. I mean, these are definite children engaged in sexual activity.").)

Hough relies upon *Davis* for the proposition that the statements made during police interrogations are testimonial. On the surface, this appears to be correct. The wrinkle in Hough's argument is that he attempts to apply *Davis* to the statements of the law enforcement officers -- in this case, Detective Kemper -- participating in the interrogation, rather than to the subject of the interrogation. With one exception which is discussed below, the Court can find no case law, either binding or nonbinding on this Court, that addresses the issue raised by Hough. The case law appears to be entirely concerned with whether the interrogation *subject's* statements are testimonial. Nonetheless, a careful reading of *Davis* leads the Court to conclude that Detective Kemper's recorded statements or inquiries from the interrogation video do not constitute testimonial statements, and therefore, no Confrontation Clause right attaches to Kemper's statements.

In particular, two footnotes in *Davis* speak to the issue. First, a footnote to the excerpt set forth above provides as follows:

> Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations--which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning. Raleigh's Case, 2 How. St. Tr. 1, 27 (1603).) *And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.*

Davis, 547 U.S. at 822 n.1 (emphasis added). In another footnote, the *Davis* court offered additional insight.

> Police interrogations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes present future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. *The Confrontation Clause in no way governs police conduct, because it is the trial use of, not the investigatory collection of, ex parte testimonial statements which offends that provision.* But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

Id. at 832 n.6 (emphasis added). The excerpts from *Davis* above, while pulled from footnotes and not addressing the precise argument that Hough raises, are straight-forward. The court distinguished between a "declarant's statements" and an "interrogator's questions." The court distinguished between "trial use of" *ex parte* testimonial statements and "investigatory collection of" such statements. In both instances, the Supreme Court teaches, the Confrontation Clause is concerned only with the first category. This leads the Court to conclude that Hough's Confrontation Clause rights did not attach to Detective Kemper's recorded comments and questions, regardless of how inflammatory or prejudicial they may appear to him. This is consistent with the hearsay discussion set forth above, in which statements made by individuals with whom the declarant's is speaking, such as the person on the other end of the jailhouse call, are considered to be offered to provide context for the declarant's statements rather than for the truth of the matter asserted.

It is worth noting that the Northern District of Oklahoma addressed this issue in an opinion that is not binding on this Court. In *Glenn v. McCollum*, 2016 U.S. Dist. LEXIS 52738

(N.D. Okla. Apr. 20, 2016), a habeas petition filed by a state court prisoner pursuant to 28 U.S.C. § 2254, that court addressed petitioner's argument that his Confrontation Clause rights were violated when a DVD recording of his police interview was introduced at trial, and only one of the two interrogating officers was a witness at trial or previously available for cross-examination. The court noted that unlike some other circuits (including the Sixth Circuit), the Tenth Circuit rejects the argument that statements of a third party on a recording are not hearsay because they are merely providing context for the declarant's statement. *Id.* at *32 (quoting *U.S. v. Collins*, 575 F.3d 1069, 1074 (10th Cir. 2009) ("Ad hominem attacks, accusations of lying, and general posturing may be standard in police interrogations, but they have little evidentiary value unless the government intended for the jury to believe the truth of those statements."). The court went on to note that the Supreme Court "has not determined whether the admission of a non-testifying police officer's statements, made during a videotaped interview and presented to the jury, violates the Confrontation Clause." *Id.* at *33; *id.* at *33 n.1 (noting that in October 2015, the Supreme Court denied a petition for writ of certiorari on the issue of whether non-testifying co-defendant's statements are admitted in evidence when quoted in custodial interrogation of defendant and presented in that way to the jury). The court concluded that the petitioner could not meet his burden of showing ineffective assistance of appellate counsel in relation to a failure to raise the Confrontation Clause argument. *Id.* at *33-34.

Based on the foregoing, the Court concludes that Hough cannot succeed on an ineffective assistance of counsel argument in relation to Ground 4. While his argument regarding the effect of the portions of the video recording involving Detective Kemper is compelling, he cannot point to authority that would show that his Sixth Amendment rights were violated. Accordingly, his

counsel's decision not to raise a Confrontation Clause argument was objectively reasonable. He cannot meet *Strickland*'s exacting standard in relation to Ground 4.

The Magistrate Judge recommends that Hough's Section 2255 petition be denied as to Ground 4.

5. Alleged Failure by United States to Provide Exculpatory Evidence

In Ground 5, Hough asserts that his Fifth and Sixth Amendment rights were violated due to continuing "Brady and Jencks-style violations," including the United States having withheld analytical reports, police records, and the contents of his email accounts. (DN 198 at 14.) In his supplemental memorandum, Hough provides a list of items that he claims the United States withheld. (*See* DN 203 at 21.) He argues that he is entitled to a new trial on the basis of the United States' actions. (*Id.* at 22.) In response, the United States argues that it provided all discoverable materials in this case and describes Ground 5 as a thinly-veiled fishing expedition. (DN 207 at 14-15.) The Court will address each of the categories of evidence mentioned in Ground 5, as well as the United States' responses, in the analysis below.

Hough bases Ground 5 on alleged violations of "Brady and Jencks." (DN 198 at 14.) The *Brady* doctrine and the Jencks Act grant a criminal defendant access to certain evidence. The *Brady* doctrine requires the prosecution to disclose to a criminal defendant all material exculpatory and impeachment evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Jells v. Mitchell*, 538 F.3d 478, 501-02 (6th Cir. 2008). "The Jencks Act requires that, following the testimony of a government witness, the defendant can request, and the court order, the government to provide certain documents that relate to the subject matter of the government witness' testimony." *United States v. Green*, 2008 U.S. Dist. LEXIS 102784, *2 (W.D. Ky. Dec.

18, 2008) (citing 18 U.S.C. § 3500(a), (b)). Notably, in post-*Brady* decisions, the Supreme Court has held that the accused is not required to request the information in order for the government's duty to disclose to attach. *See United States v. Agurs*, 427 U.S. 97, 108 (1976).

"Interpreting the *Brady* doctrine, the Sixth Circuit has explained that 'the Due Process clause does not impose "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution."'" *Id.* (quoting *United States v. Jobson*, 102 F.3d 214, 219 (6th Cir. 1996) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988))). "The government's constitutional duty to preserve evidence is limited to evidence that possesses an exculpatory value which was apparent before the evidence was destroyed." *Jobson*, 102 F.3d at 219. Thus, the United States is not obligated to preserve all material that might be relevant to a prosecution, but it must preserve any material that is known to exculpate the defendant. A *Brady* violation is demonstrated if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.). "Again, the constitutional principle at issue under *Brady* is the avoidance of an unfair trial to the accused." *Davis v. Motley*, 2011 U.S. Dist. LEXIS 46887, *9 (W.D. Ky. Mar. 4, 2011) (citing *Brady*, 373 U.S. at 87). Finally, the materiality of undisclosed evidence is to be considered collectively rather than item by item.[4] *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. We have never held that the Constitution demands an open file policy . . . .") (internal citation omitted).

[4] The Court need not proceed to broader *Brady* materiality analysis in this case because, as the below discussion will show, the Court concludes that none of the items raised in Ground 5 evidence a *Brady* violation.

a. *Detective Kemper's Notes*

First, Hough claims that the United States should have produced Detective Kemper's notes, which he states were mentioned during Maurer's trial testimony. (DN 203 at 21 (citing DN 178 at 81-82.[5]).) The United States argues that an investigator's notes are not *per se* discoverable and that Hough does not articulate the relevance of the notes. (DN 207 at 14.)

"No *Brady* violation occurs if the defendant is on notice of the essential facts, which would have permitted the defense to take advantage of the information." *Davis*, 2011 U.S. Dist. LEXIS 46887 at *11 (citing *Spirko v. Mitchell*, 368 F.3d 603, 611 (6th Cir. 2004); *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000)). "Moreover, the defendant carries the burden of proving the claimed *Brady* material was not otherwise disclosed." *Id.* (citing *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998)). The Sixth Circuit has even held that the routine destruction of interview notes does not violate either the *Brady* doctrine or the Jencks Act. *Green*, 2008 U.S. Dist. LEXIS 102784 at *3 (citing *United States v. McCallie*, 554 F.2d 770, 773 (6th Cir. 1977) (citing *United States v. Hurst*, 510 F.2d 1035, 1036 (6th Cir. 1975)); *United States v. Lane*, 479 F.2d 1134, 1135-36 (6th Cir. 1973), cert. denied, 414 U.S. 861 (1973); *United States v. Fruchtman*, 421 F.2d 1019, 1021-22 (6th Cir. 1970), cert. denied, 400 U.S. 849 (1970).

In this case, Hough fails to demonstrate that the United States had a duty to disclose Detective Kemper's notes. Hough does not explain why he believes that Detective Kemper's

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[5] Q: You were never formally interviewed in this case, were you, by the police?
A: Just at the house.
Q: Did they record your conversation, or was it just you talking with Detective Leigh Kemper?
A: She was writing notes.

(DN 178 at 81-82 (Maurer's testimony on cross-examination).)

notes -- to the extent that they exist -- would be exculpatory.[6] The United States relied upon the information that Maurer provided to the investigating officers in obtaining and executing a search warrant and in deciding to interrogate Hough, so it is unclear why he believes that Detective Kemper's notes at the time that the search warrant was executed would be favorable to him. Moreover, even assuming that the notes existed and contained exculpatory information, Hough has not met his burden of showing that the claimed *Brady* material was not disclosed. It is clear that prior to trial, Hough and his counsel were aware of the series of events that led to his arrest and indictment. On the same day that Detective Kemper purportedly took notes while interviewing Maurer, the investigating officers, relying in part on information provided by Maurer, questioned Hough and later arrested him. The Court concludes that Hough was on notice of the essential facts that would have been included in Detective Kemper's notes, to the extent that they exist. *See, e.g.*, *Davis*, 2011 U.S. Dist. LEXIS 46887 at *10-12 (finding no *Brady* violation where government did not disclose detective's notes because accused was informed of essential facts that were included in the notes by way of production of other investigative reports).

b. *Criminal Complaint*

The second item that Hough mentions in Ground 5 is "the complaint." (DN 203 at 21 (citing DN 179 at 53).) The portion of the trial transcript to which he points is from Sergeant Schwab's testimony on direct examination when the United States played the condensed video of Hough's interrogation. In the video, Sergeant Schwab is heard to say, "Originally, when I asked

[6] To the extent that Hough claims that there was a Jencks Act violation in relation to Detective Kemper's purported notes, he is incorrect. Detective Kemper did not testify at Hough's trial and, therefore, her notes from interviewing Maurer at the time of the search warrant execution, to the extent that they exist, do not fall under the Jencks umbrella. *See* 18 U.S.C. § 3500(a), (b).

you to come down and talk to us . . . all that we had was this complaint that you had underage pornography on your computer." (DN 179 at 53.) The United States argues in its response that the "complaint" referenced by Sergeant Schwab was Maurer's initial call to authorities regarding what she claimed to have found on the computer. (DN 207 at 14 ("Clearly, Hough knew about that information as it is set out in the affidavit in support of the search warrant.").)

The Court concurs with the United States. It is clear from the trial transcript that the "complaint" referenced by Sergeant Schwab was Maurer's initial telephonic complaint to LMPD CACU. Clearly, the United States provided to Hough the substance of the information provided to police by Maurer at that time, given that he has had a copy of the search warrant since the time of its execution. There is no *Brady* or Jencks violation in relation to the "complaint."

c. *GoBack Program Records from April 18, 2005 and Contents of "MINE" Computer Folder*

Next, Hough asserts that the United States failed to produce copies of the "GoBack" program records or the contents of an email folder entitled "MINE" from his desktop computer. (DN 203 at 21.) The United States contends that all materials relative to the computer forensic examinations, including the contents of the GoBack program and the MINE folder, "were made fully available to the defense," and that the defense used its own computer expert to conduct an independent examination. (DN 207 at 14-15.) In his reply, Hough argues that the United States disclosed GoBack records for April 9 and 12, 2005, but not for April 18, 2005, the day of the search warrant execution and arrest. (DN 208 at 10.) He contends that the records that were not disclosed would have undermined the testimony of Maurer, Sergeant Schwab, and Detective

Lamkin, and would have shown other computer activity that was needed for Hough's defense. (Id.)

The United States states credibly that it made available to Hough all materials relevant to the forensic examination. That would include potentially inculpatory and exculpatory evidence. As is discussed throughout this report, Hough's counsel engaged in a rigorous cross-examination of Detective Lamkin, who performed the forensic examination. Hough has not shown the existence of any withheld Brady or Jencks material with respect to the GoBack program or computer folder entitled "MINE."

d. *Original Police Interrogation Video*

Hough claims that the United States failed to produce an accurate copy of the original video of his interrogation, in violation of his Constitutional rights. (DN 203 at 21.) The United States argues in response that Hough received an unedited copy of the interrogation video and that the jury saw an edited video in keeping with evidentiary rulings made by the trial court. (DN 207 at 15.) Hough maintains in reply that he only received a copy of the "dubbed video," which failed to show that he was given *Miranda* warnings at the end of the interrogation, not at the beginning (as he contends was the case). (DN 208 at 11.)

Hough's argument on this point fails. First, the United States argues credibly that it provided to Hough the full and complete copy of the interrogation video. It was on the basis of this full video that Hough's trial counsel filed a motion to suppress statements based on a violation of *Miranda* and its progeny, and in ruling on Hough's motions in limine, the trial court required that an edited version of the video be shown to the jurors. Hough's argument that he did not receive a full and complete video of the interview is not credible based on the record.

Second, the Sixth Circuit upheld the trial court's ruling on the *Miranda* issue, concluding that Hough was not "in custody" for purposes of *Miranda* when he gave a statement to police, that he was not entitled to a presumption of coercion, and that the district court did not clearly err in finding that the statement was voluntary. (*See* DN 188 at 2.) Accordingly, settled law bars Hough from re-litigating this claim through a habeas petition. *See Bousley*, 523 U.S. at 622. There are no highly exceptional circumstances present here, such as an intervening change in the law, which would overcome this rule. *See Dupont*, 76 F.3d at 110.

e. *Witness Interview Transcripts*

Hough also claims that the United States failed to provide to him copies of transcripts of law enforcement interviews of Carl Egly, Angel Thomas, and Michael Thomas.[7] (DN 203 at 21.) He argues that production of the transcripts would show that their testimony would not have been hearsay because it would have been offered not for the truth of statements that Maurer purportedly made, but only to establish the fact that she made the statements. (*Id.*) In response, the United States argues that it has no obligation to turn over potential witness interviews unless they are exculpatory in nature, that the transcripts now sought by Hough were not exculpatory, and that it successfully moved to have the Thomases' testimony limited. (DN 207 at 15.) In reply, Hough contends that the interview transcripts would have implicated Maurer in framing Hough by putting child pornography on his computer. (DN 208 at 11.)

With respect to the Thomases, the Court finds that Hough has not shown the existence of a *Brady* violation or ineffective assistance of counsel.[8] The trial court addressed the admissibility of the Thomases' anticipated testimony during a hearing on the eve of trial and again with counsel prior to the start of the first day of trial. (*See generally* DN 182; DN 178.) The court considered at great length the parties' arguments and parsed the Federal Rules of Evidence as they might apply to the Thomases' anticipated testimony. (*See* DN 178 at 3-30.) The court ultimately entered an order granting the United States' motion to exclude the Thomases' anticipated testimony as hearsay. (DN 149 (motion in limine); DN 154 (order).)

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[7] It appears from the record that Michael Thomas and Carl Egly are both Rhonda Maurer's sons. Angel Thomas is Michael Thomas's wife. (*See* DN 178 at 88-89 (Maurer stating that she has three sons and identifying Michael Thomas as one son and Angel Thomas as her daughter-in-law); DN 208 at 11 (Hough's reply, alleging that Egly is also one of Maurer's sons).)

[8] The Jencks Act does not apply to the Thomases as there is no evidence in the record that they provided testimony in relation to the criminal prosecution, and the United States did not call them as witnesses. *See* 18 U.S.C. § 3500(a), (b).

Hough challenged the ruling on direct appeal, and the Sixth Circuit concluded that the district court did not abuse its discretion in granting the United States' motion in limine and excluding the Thomases' anticipated testimony. (DN 188 at 5.) As with the *Miranda* challenge discussed above, Hough cannot re-litigate an issue that was settled on direct appeal absent highly exceptional circumstances. None exist here. Moreover, as with Detective Kemper's notes and other items raised in Ground 5, the lengths to which Hough's counsel went to attempt to have the Thomases testify at trial indicates both that his trial and appellate attorneys worked diligently on this issue and that Hough was on notice of the essential facts present in any law enforcement transcripts of interviews with the Thomases, thereby foreclosing any claims based on *Strickland* or *Brady*.

Ground 5 raises a more complex question in relation to Carl Egly, as there is no information regarding Egly in the trial transcript. Nonetheless, the larger record of the criminal proceedings provides more information regarding Egly and any role that he may have had in the criminal case. In April 2011, Hough (represented by counsel who was later replaced by the attorney who represented Hough at trial) filed a sealed *ex parte* motion for the Court to issue subpoenas for Michael Thomas, Angel Thomas, and Carl Egly to testify at trial. (DN 116 (sealed).) That motion was granted, and a subpoena of Egly issued, also under seal. (DN 117, DN 118 (both sealed).) Proof of service was also entered in the record. (DN 131 (sealed).) Ultimately, however, Egly did not testify at trial.

The circumstances recounted above belie Hough's arguments regarding Egly. First, there is no Jencks Act violation in relation to Egly. As is set forth above, a criminal defendant's rights under Jencks attach only when the government puts forth witness testimony. Hough has not

alleged that Egly provided testimony on behalf of the United States in any forum. Second, the Court finds that there was no *Brady* violation in relation to Egly. To the extent that the government interviewed Egly and notes from such interview exist, Hough cannot meet his burden of proving that the claimed *Brady* material was not otherwise disclosed. *Davis*, 2011 U.S. Dist. LEXIS 46887 at *11 (citation omitted). Hough asserts that he knows exactly what Egly's interview notes would show, and consequently, the contents of Egly's would-be testimony. He states in his reply brief that "[t]he interview with Egly would show that his mother -- Ms. Maurer, bragged to him about placing pornography -- child pornography -- on the computer in order to blame Hough." (DN 208 at 11.) He further states that Hough's testimony "would be similar" to that of Michael and Angel Thomas, "although containing a different date." (*Id.*) Based on the foregoing, this is a situation in which there is "[n]o *Brady* violation [because] the defendant is on notice of the essential facts, which would have permitted the defense to take advantage of the information." *Davis*, 2011 U.S. Dist. LEXIS 46887 at *11 (citations omitted). Consistent with the Court's finding above in relation to Detective Kemper's supposed notes from interviewing Maurer, the Court concludes that to the extent that notes from an interview of Egly exist, Hough was on notice of the essential facts in those notes.

Finally, to the extent that Hough intends to raise the issue of ineffective assistance of counsel in relation to Egly, the Court finds that such a claim has no merit. As is set forth above, the record shows that Hough's counsel diligently pursued Egly by appropriate means -- a subpoena -- and ultimately did not seek to have him testify at trial. Counsel exerted significant effort in seeking to have the Thomases testify at trial and pursued that issue on appeal. Hough states that Egly would have provided similar testimony, and it appears that his counsel made the

reasonable decision to pursue the Thomases, rather than Egly, to testify at trial. Moreover, the same conclusions, rooted in the Rules of Evidence, applied by the trial court and upheld by the Sixth Circuit, would have applied to exclude Egly's testimony. In short, the Court finds that Hough has not cleared the first *Strickland* hurdle by showing that counsel's performance was deficient. *Strickland*, 466 U.S. at 687 ("A claim of ineffective assistance of counsel requires the petitioner to show that [1] counsel's performance was deficient and [2] that the deficiency prejudiced him.").

f. *Hough's Email Account*

The items listed under Ground 5 vary among Hough's initial 2255 petition, supporting memorandum, and reply. For example, he lists the contents of a folder entitled "MINE" in his email account as a separate entry in his memorandum (DN 203 at 21), and in his reply, he includes his email account as a whole (DN 208 at 11). The same reasoning set forth above in relation to the GoBack records and the "MINE" email folder applies equally to Hough's email account as a whole. There is no evidence of a *Brady* or Jencks Act violation or ineffective assistance of counsel in relation to Hough's email account.

Based on the foregoing, the Magistrate Judge recommends that Hough's Section 2255 petition be denied as to Ground 5.

6. Use at Trial of "Other" Allegedly Improper Evidence

In his sixth ground for relief, Hough argues that his Fifth Amendment, Sixth Amendment, and other constitutional rights were violated when evidence of "other things" not relevant to the offenses that he was alleged to have committed were admitted in evidence at trial. (DN 198 at 14.) In his supplemental memorandum, he argues that much of the testimony provided at trial

was unrelated to the offenses of which he was accused and that the testimony had an unfair and prejudicial effect on the jurors. (DN 203 at 25.)

In response, the United States points out that Hough's trial counsel successfully moved for exclusion of evidence of other bad acts. It contends that the evidence admitted at trial went to establishing the elements of the offense. (DN 207 at 15-17.) In reply, Hough contends that the trial court improperly admitted 79 pages of adult pornography, which was irrelevant to the charges against him and, consequently, prejudicial. (DN 208 at 11-12.)

Hough did not raise the issue in Ground 6 on direct appeal. Accordingly, he may only raise it in this habeas proceeding if he can demonstrate cause and actual prejudice. *Bousley*, 523 U.S. at 622 (citations omitted). Again, it appears that the basis for Hough's "cause and prejudice" arguments is that he received ineffective assistance of counsel. Therefore, the Court will examine Ground 6 through the lens of *Strickland*'s rigorous ineffective assistance test.

First, the Court notes that the case on which Hough relies in his supporting memorandum, *United States v. Brown*, 579 F.3d 672 (6th Cir. 2009), is inapplicable to this case, as it involved a review of the district court's application of federal sentencing guidelines, not evidentiary determinations by the trial court, and was a direct appeal rather than a habeas petition.[9] Second, it is a close call whether Hough actually states a claim of ineffective assistance in relation to other bad acts. Rule 2(b)(2) of the Rules Governing Section 2255 Proceedings for the United States District Courts requires, among other things, that the petitioner "state the facts supporting each ground." Hough's initial petition contains no facts in relation to which the Court could consider an argument of ineffective assistance. (*See* DN 198 at 14 ("Yet the evidence was

[9] The Court is unable to locate the other case on which Hough relies in his supporting memorandum. (*See* DN 203 at 23 (citing *United States v. Taylor*, 2013 U.S. App. LEXIS 18224 (6th Cir. 2013).)

weighted with improper 'smear' items -- web pages, chats, etc.").) The supporting memorandum is only slightly better; while it lists in paragraph form the evidence to which he objects, the descriptions range from vague to inscrutable.[10] (*See, e.g.*, DN 203 at 23-24 (using phrases such as "It was insinuated that . . ." and "It was intimated that . . .").) The instances that Hough points to are so under-developed that it is difficult for the Court to determine how he contends that his attorney should have acted differently.

Only in his reply does Hough set forth a clearer factual basis for Ground 6, pointing specifically to 79 pages of what he terms "other pornography," which he says were admitted in evidence and poisoned and misled the jury. (DN 208 at 11.) This clears the hurdle of failure to state a claim with respect to the other, non-child pornography. However, Hough fails to clear that hurdle with respect to approximately 20 exhibits that he claims were admitted despite having "absolutely no rational or relevant connection to the offense being considered." (*Id.* at 11-12.) Simply asserting that evidence admitted at trial was irrelevant to the elements of the charges against him is insufficient to allow the Court to undertake a "cause and prejudice" analysis. Based on the foregoing, the Court concludes that with the exception of the non-child pornography images, Ground 6 fails to state a claim sufficient to proceed. *See, e.g.*, *Atchley v. United States*, 2011 U.S. Dist. LEXIS 43567, *25-26 (E.D. Tenn. Apr. 21, 2011) ("Contrary to the express directions of Rule 2(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts, Atchley's claim that counsel failed to properly argue against other

[10] In any event, even if the Court were to conclude that he provided a sufficient factual basis to proceed with Ground 6 as a whole, Hough's supporting memorandum undermines his argument. After suggesting that improper testimony and exhibits were admitted regarding where images of child pornography were actually located on the computer, he then suggests that a portion of his attorney's cross-examination of Detective Lamkin undermines the United States' point. (*See* DN 203.) In short, Hough cannot maintain an ineffective assistance argument when he personally points the Court to a portion of the transcript that shows his attorney engaging in a strong cross-examination of a government witness on the supposed "other acts" evidence.

bad acts being introduced at trial, he has failed to properly raise a claim" due to a lack of "any factual support").

With respect to what Hough describes as images of adult pornography that were admitted, the Court finds that Hough fails to satisfy the "cause and prejudice" test. To begin, it is again difficult to determine exactly what Hough intends to discuss. Hough points to Trial Exhibit 19, which he says contains "79 pages of 'other pornography'" or "legal, adult pornography." (DN 208 at 11.) Exhibit 19 consisted of photos of computer screens from the time in which the GoBack computer program was in use. (DN 179 at 212-13, 286.) Hough may have intended to refer instead to Exhibit 17, which was a compact disk containing images found on his computer; the United States alleged that each of the images was child pornography. (*Id.* at 286; *id.* at 201 (Detective Lamkin identifying Exhibits 16 and 17 as containing images of suspected child pornography).) Perhaps Hough intends to argue that some of the images of what the United States and its witness described as suspected child pornography were actually legal, adult pornography. Even if the Court assumes that Hough is correct that images of adult pornography were shown to the jury, the Court cannot find that Hough has met the high burden of establishing ineffective assistance of counsel. Hough's attorney demonstrated a strong grasp of the facts underlying this case and engaged in lengthy, rigorous cross-examinations of government witnesses. Trial counsel also successfully moved to exclude other "bad acts" evidence related to in-person sexual assault or contact *with minors*. (*See* DN 69 at 2; DN 78.) Additionally, a review of the transcript shows that the court and counsel worked together to ensure that all pornographic images admitted in evidence were carefully described, particularly by referring to them as *suspected* child pornography.

Finally, even if Hough could demonstrate "cause" in the form of failure to meet *Strickland*'s objective reasonableness standard, the Court finds that he could not establish prejudice. Even if images of adult pornography were inadvertently or intentionally shown to the jury, Hough cannot show that "the result of the proceedings would have been different" had the jury not seen those images. *Moss*, 323 F.3d at 454 (6th Cir. 2003) (quoting *Strickland*, 466 U.S. at 694). He does not and cannot show that the jurors' conclusion that the United States proved beyond a reasonable doubt the elements of the crime with which he was charged would have been altered had purported images of adult pornography not been shown to them.

Based on the foregoing, the Magistrate Judge recommends that Hough's Section 2255 petition be denied as to Ground 6.

7. Use at Trial of Allegedly Perjured and Manipulated Evidence

In Ground 7, Hough asserts that his Fifth and Sixth Amendment rights were violated when audio and video recordings of his police interrogation were manipulated. He claims that his counsel provided ineffective assistance when he failed to challenge the completeness and accuracy of the recordings. (DN 198 at 14.) In his supplemental memorandum, he further contends that the recordings permitted false, or perjured, testimony to enter the record by virtue of the interviewing officers making untrue statements. (DN 203 at 27-28.)

In response, the United States contends that Hough changed his argument in his memorandum of law, and that it agreed to an extension of time to permit Hough to submit a legal memorandum, but not to submit a second habeas petition. In any event, the United States argues, there is no evidence in the record that would suggest that the United States presented either manipulated evidence or perjured testimony. (DN 207 at 17-18.) In reply, Hough argues that his

claims should be construed broadly because he is representing himself in this action. He further argues that the allegations set forth in Ground 7 "sit comfortably under a *Brady* claim" set forth elsewhere in his petition. (DN 208 at 12.)

The Court finds that Ground 7 is without merit. Hough did not raise the issues set forth in Ground 7 in his direct appeal to the Sixth Circuit. Accordingly, he may only raise those issues in this proceeding if he can demonstrate cause and actual prejudice. *Bousley*, 523 U.S. at 622 (citations omitted). Again, the Court interprets the Hough's petition as basing a "cause and prejudice" argument on a broader theory of ineffective assistance of counsel. Therefore, the Court will examine Ground 7 through the lens of *Strickland*'s strict ineffective assistance test.

First, the record does not support Hough's contention that the interrogation video shown at trial amounted to perjured testimony or that it was improperly manipulated by the United States. As is set forth above in relation to Ground 5, part (d), the United States argues credibly that it provided to Hough a full and complete copy of the interrogation video. Indeed, Hough's counsel filed a motion to suppress and motions in limine related to the video's contents and its presentation to the jury; the trial court required that only an edited video be shown to the jurors. Hough's argument that he did not receive an unedited version of the video is not credible. There is no evidence of a *Brady* violation in relation the police interrogation video.

Second, as the Court concluded above in relation to Ground 4, Hough's argument that Detective Kemper was permitted to testify "in absentia" fails. The portions of the video shown to the jurors were chosen in accordance with pretrial rulings by the court. The portions of the video featuring statements by Hough were non-hearsay out-of-court statements admissible pursuant to Rule 801(d)(2)(A) of the Federal Rules of Evidence. The portions of the video

containing statements by Sergeant Schwab and Detective Kemper were not "testimony" in any sense and were not offered for their truth, but to provide context for Hough's statements.

Third, Hough's arguments regarding "false testimony" is insufficient to raise a claim of ineffective assistance pursuant to Rule 2(b)(2) of the Rules Governing Section 2255 Proceedings for United States District Courts. Hough fails to "state the facts supporting each ground," as that Rule requires. He merely cites portions of the record and states that the testimony provided by government witnesses was untrue, false, incorrect, or inaccurate. (*See* DN 203 at 27-28; DN 208 at 12.) He does not develop his arguments whatsoever. Without more, the Court cannot analyze the strength of his arguments regarding false testimony.

Finally, the Court finds that none of the above arguments advanced by Hough in relation to Ground 7 meets the high standard applicable to ineffective assistance claims. *Strickland* requires that judicial scrutiny of counsel's performance be highly deferential. *Strickland*, 466 U.S. at 689. Even if the law did not require such deference, the Court would find that there was no *Strickland* violation under the circumstances set forth in Ground 7. The Court has concluded that Hough *did* receive an unredacted version of the interrogation video. Additionally, there was no error in counsel's decision not to argue that Detective Kemper was permitted to testify without Hough having the opportunity to cross-examine her, because Kemper's video statements were not testimony. Even if the Court did conclude that the arguments regarding false testimony were sufficient to state a claim, it would nonetheless find that there was no evidence of ineffective assistance in relation thereto. As is stated throughout this opinion, defense counsel was well-prepared for each government witness and subjected each one to thorough cross-examinations. *Strickland* requires that to prevail on an ineffective assistance claim, the petitioner

must show that counsel made errors that were so egregious as to not function as the "counsel" guaranteed by the Sixth Amendment. Considering counsel's actions objectively, the Court concludes that he made reasonable decisions in relation to the arguments raised in Ground 7.

Based on the foregoing, the Magistrate Judge recommends that the petition be denied as to Ground 7.

8. Ineffective Assistance of Counsel - Failure to Prepare for Trial

In Ground 8, Hough claims that his "trial and plea rights were harmed" when his counsel was not effective. (DN 198 at 14.) He argues that his counsel did not prepare for trial or consider or discuss any defenses, including a "viable actual innocence defense." (*Id.*) Hough provides examples of how his trial counsel was ineffective by pointing to Grounds 1, 2, 3, and 4. (DN 203 at 29-30.)

In response, the United States argues that Hough's trial counsel was a well-respected, experienced member of the federal defense bar and that a review of the trial transcript shows that counsel had a thorough grasp of the facts, issues, and proof in this case. In particular, the United States points to defense counsel's effective cross-examinations of government witnesses and coherent theory of the case. The United States also points out that appellate counsel raised an argument that the evidence was insufficient to support a conviction, and the Sixth Circuit rejected the claim. (DN 207 at 18-19.)

The Court need not devote significant time to Ground 8. Hough's ineffective assistance claim in Ground 8 is premised on Grounds 1, 2, 3, and 4 and general statements that his trial counsel did not sufficiently prepare for trial or consult with Hough regarding trial strategy. The Court has already addressed the sufficiency of Hough's counsel in relation to Grounds 1, 2, 3, 4,

parts of 5, 6, and 7.[11] The Court found in considering each of those grounds for relief that Hough failed to make an ineffective assistance claim that could withstand the rigorous *Strickland* test. A careful review of the trial transcript shows that counsel had a firm grasp of the facts underlying this case, maintained a consistent theory of the case, and thoroughly cross-examined the government's witnesses. Hough has not shown that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms. *Strickland*, 466 U.S. at 688.

Accordingly, the Magistrate Judge recommends that the Court deny the Section 2255 petition in relation to Ground 8.

9. Maurer's Involvement with Computer

In his ninth and final ground for relief, Hough contends that evidence was tainted when the police officers executing the search warrant permitted Maurer to use the desktop computer after they arrived at the apartment. He claims that his counsel failed to raise this issue and, as such, provided ineffective assistance. (DN 203 at 30-31.) In response, the United States argues that Maurer's use of the computer during the execution of the search warrant was addressed in detail at trial, including on cross-examination, and that the law does not require trial counsel to explore each and every conceivable argument in Hough's favor. (DN 207 at 19.) Hough does not address Ground 9 in his reply. (*See generally* DN 208.)

Hough did not raise the issue of Maurer's use of the computer after law enforcement officers arrived on direct appeal. Accordingly, he may only raise the issue in this habeas

[11] In Ground 9, Hough also appears to make an ineffective assistance of counsel argument in relation to Grounds 6, 7, and 9, whereas in Ground 8, which is explicitly premised on ineffective assistance, he does not mention those grounds. (*See* DN 203 at 33.) Setting aside the confusing structure of his claims, the Court's analysis on each of the grounds in Hough's 2255 petition demonstrates the conclusion -- as to each ground -- that Hough has not satisfied the exacting *Strickland* standard for ineffective assistance.

proceeding if he can demonstrate cause and actual prejudice. *Bousley*, 523 U.S. at 622 (citations omitted). As with the other grounds for relief not raised until the habeas stage, the Court construes Ground 9 as basing a "cause and prejudice" argument on a broader theory of ineffective assistance of counsel. For that reason, the Court will analyze Ground 9 on the basis of *Strickland* and its progeny.

The Court recognizes the Hough's position that jurors might view as suspicious the fact that Maurer accessed the computer upon the arrival of the officers to execute the search warrant. Indeed, that position is consistent with his theory, asserted at least implicitly in the course of trial and explicitly in his habeas petition, that Maurer framed him. Contrary to Hough's assertions, the Court cannot agree that his trial counsel provided ineffective assistance in relation to Maurer's use of the computer. The issue was raised first on direct examination, at which time Maurer freely admitted that she used the computer after the officers arrived. (*See* DN 178 at 61-62.) She further testified that her reason for using the computer was to "[t]ry[] to get to that file [showing images of child pornography] and show them where it was on the computer," and that she was unable to find the images to show the officers. (*Id.*) Later, on cross-examination, Hough's attorney raised the issue, and Maurer reiterated that she accessed the computer after the officers arrived. (DN 178 at 83-85.) She further stated that she could not recall whether she got on the computer in between the time that she contacted the police and their arrival. (*Id.* at 85.) Counsel also strenuously cross-examined Sergeant Schwab about the officers having permitted Maurer to access the computer after their arrival. (*See* DN 179 at 85-89.) This cross-examination of Sergeant Schwab conveyed to the jury Hough's theory that by permitting Maurer to access the computer, the officers allowed evidence to be contaminated. (*See id.* at 86-87.)

The Sixth Circuit has recognized the "longstanding and sound principle that matters of trial strategy are left to counsel's discretion." *Dixon v. Houk*, 737 F.3d 1003, 1012 (6th Cir. 2013). In light of that principle, "where a defendant focuses on counsel's 'strategic choices made after thorough investigation of law and facts,' the Supreme Court guides us that such choices are *virtually unchallengeable*." *Id.* (quoting *Strickland*, 466 U.S. at 690 (emphasis added in *Dixon*)). The discretion exercised by Hough's trial counsel exemplifies this principle enunciated by the Sixth Circuit. Based on a careful review of the transcript, the Court concludes that Hough's counsel made a reasonable decision to use cross-examination of multiple witnesses as a means of calling attention to and challenging Maurer's use of the computer. Counsel's actions were objectively reasonable and did not prejudice Hough. The Court concludes, therefore, that Hough cannot mount a viable challenge under *Strickland*.

For the foregoing reasons, the Magistrate Judge recommends that Hough's petition be denied in relation to Ground 9.

C. Certificate of Appealability

The final question before the Court is whether Hough is entitled to a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253(c). In this case, the Magistrate Judge recommends that the Court not grant Hough a certificate of appealability. This Court has analyzed Hough's petition on both procedural grounds and on the merits, in part because of a frequent lack of clarity from Hough as to the precise basis for his grounds for relief. The Court has concluded that his petition should be denied as to each ground asserted therein. In *Slack v. McDaniel*, 529 U.S. 473, 484-54 (2000), the Supreme Court established a two-pronged test to determine whether a COA should issue on procedural grounds. To satisfy the first prong, a

petitioner must demonstrate that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Id.* at 484. To satisfy the second prong, a petitioner must show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* If the Court determines that the petitioner failed to satisfy the first prong, then it need not address the second. *Id.* at 485. When the Court rejects a claim on the merits, the petitioner must satisfy the first prong of the procedural test: that is, the petitioner must demonstrate that reasonable jurists would find the Court's assessment of the constitutional claim debatable or wrong. *Id.* at 484.

In this case, Hough has failed to make a showing required to support the issuance of a COA. He has not established the denial of any constitutional right, and there is no reason to suspect that jurists of reason would find it debatable whether he stated a valid claim of denial of a constitutional right. The Magistrate Judge believes that all of the analysis in the instant report is well-founded in the law and in the record of this case, and that Hough is not entitled to a COA. For those reasons, the Magistrate Judge recommends that a COA be denied as to all nine grounds raised by Hough.

RECOMMENDATION

The undersigned Magistrate Judge recommends that the Court **DENY** Hough's petition for habeas relief (DN 198) and dismiss it without prejudice. The Magistrate Judge further recommends that Hough be denied a certificate of appealability as to each of his claims.

January 10, 2017

Colin Lindsay, MagistrateJudge
United States District Court

Notice

Pursuant to 28 U.S.C. § 636(b)(1)(B)-(C), the undersigned Magistrate Judge hereby files with the Court the instant findings and recommendations. A copy shall forthwith be electronically transmitted or mailed to all parties. 28 U.S.C. § 636(b)(1)(C). Within fourteen (14) days after being served, any party may serve and file specific written objections to these findings and recommendations. *Id.*; Fed. R. Civ. P. 72(b)(2). Failure to file and serve objections to these findings and recommendations constitutes a waiver of a party's right to appeal. *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *see also Thomas v. Arn*, 474 U.S. 140 (1985). A party may respond to another party's objections within fourteen (14) days after being served with a copy of the objections. Fed. R. Civ. P. 72(b)(2).

cc: Counsel of record
Petitioner, *pro se*