Appendix "1"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-14955-B

BRANDON KYLE THOMAS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Brandon Kyle Thomas is a federal prisoner serving a 120-month sentence after a jury found him guilty of knowingly distributing or attempting to distribute images depicting child pornography and possession of images depicting child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B) and (a)(5)(B). Thomas did not pursue a direct appeal.

On October 23, 2013, within one year of his October 30, 2012, judgment, Thomas filed the instant 28 U.S.C. § 2255 motion to vacate his sentence. In his

motion, Thomas raised the following seven claims of ineffective assistance of counsel:

(1) Counsel failed to inform Thomas of the significance of an appeal and misadvised him of the potential consequences of an appeal;

(2) Counsel failed to challenge the government's warrantless search and resulting evidence;

(3) Counsel failed to present an affirmative defense by asserting an alternative theory of the case based on other people's access to the computer at issue;

(4) Counsel told Thomas that he could inform counsel of any questions or challenges for witnesses, but failed to do so;

(5) Counsel failed to challenge the five-day delay between the issuance and execution of the arrest warrant;

(6) Counsel abdicated any responsibility in picking the jurors by insisting that Thomas choose the jurors at the end of *voir dire*; and

(7) Counsel interfered with Thomas's right to be heard at sentencing.

The government filed a response to Thomas's motion, and, on May 4, 2014, Thomas filed a reply. In his reply, Thomas stated that he did not wish to pursue grounds six and seven of his § 2255 motion. Thomas stated that he was not amending his motion, but proceeded to raise new issues. Thomas argued that counsel was ineffective for:

(1) Failing to challenge government witness testimony;

(2) Failing to suppress Thomas's confession;

(3) Failing to produce expert testimony regarding the age of pornographic images; and

(4) Preventing Thomas from testifying on his own behalf.

Thomas also asserted that his due process rights were violated when the trial court and the government failed to provide him with copies of the transcripts of his proceedings for the purposes of his § 2255 motion. Thomas also filed a motion to expand the record to include affidavits from himself, his uncle, and his girlfriend, and a record related to the search of his home to bolster his arguments. The district court granted the motion to expand.

BACKGROUND:

Thomas was charged with distribution and possession of child pornography after a Federal Bureau of Investigation ("FBI") undercover investigation discovered electronic evidence that child pornography had been shared from an internet protocol ("IP") address connected with Thomas's residence. FBI agents went to Thomas's residence and conducted a voluntary interview, after informing Thomas that he was free to leave at any time. Thomas admitted that he had downloaded and shared child pornography and indicated that there was child pornography on the computer in his bedroom. Thomas signed a form consenting to a search of his computers and was informed that one Hewlett Packard ("HP") computer from his bedroom would be seized. The investigation revealed child

pornography on the computer. A warrant for Thomas's arrest was issued and he was arrested five days later.

At trial, the government called multiple FBI agents who had been involved in the investigation and a computer forensic examiner as witnesses. Thomas's counsel presented a defense based on the theory that multiple other people had access to the computer that contained the pornography, and questioned the FBI agents about whether Thomas's brother had a criminal conviction for child cruelty. Thomas's counsel also questioned the computer forensic expert about whether he could be absolutely sure who had used the computer and whether he could tell the precise age of the pornographic files, and the expert replied that he could not. Thomas's counsel also called Thomas's mother and girlfriend as witnesses to confirm that other people had access to the computer at issue. At trial, the district court conducted a colloquy with Thomas regarding whether he would like to testify on his own behalf, and he stated that he did not. Thomas told the court that he had chosen not to testify of his own free will and had not been threatened or coerced into the decision. At the conclusion of the trial, the jury convicted Thomas on both charged counts.

Before Thomas's sentencing hearing, a probation officer prepared a presentence investigation report ("PSI"), which stated that Thomas's advisory guideline range was 188 to 235 months' imprisonment. Thomas spoke on his own

behalf at sentencing, and his counsel recommended a below-guidelines sentence. Over the government's objection, the district court sentenced Thomas to 120 months' imprisonment, a 68-month downward departure. Thomas did not file a direct appeal.

The district court denied Thomas's instant § 2255 motion on the merits. The district court determined that counsel was not ineffective for informing Thomas of the potential risk that the government could file a cross-appeal that could have resulted in a longer sentence. Furthermore, the district court concluded that none of counsel's trial-strategy decisions constituted ineffective assistance of counsel. The district court found that Thomas's new claims raised in his reply brief were time-barred because they did not relate back to his original complaint. Alternatively, the district court determined that the claims were due to be denied on the merits as conclusory and unsupported by evidence. The district court denied Thomas a certificate of appealability ("COA").

Thomas filed a motion for reconsideration, pursuant to Fed. R. Civ. P. 59(e), of the district court's denial of his § 2255 motion. In his motion for reconsideration, Thomas argued that the district court had committed errors of law and fact because he submitted affidavits from himself, his uncle, and himself showing what they would have testified to had they been given the chance. He also argued that he should not be subject to the statute of limitations because he

was actually innocent. The district court denied the motion, stating that Thomas had failed to show any manifest errors of law or fact or any newly discovered evidence. The district also denied leave to proceed on appeal *in forma pauperis* ("IFP"). Thomas has now appealed the denial of his § 2255 and Rule 59(e) motions and seeks a COA and leave to proceed on appeal IFP from this Court. In his motion requesting a COA, Thomas argues that the district court should have conducted an evidentiary hearing and should have expanded the record to include the eyewitness affidavits that he submitted regarding the allegedly improper search and confession.

DISCUSSION:

In addition to being required to appeal the denial of a § 2255 motion, a COA is required to appeal the denial of a Fed. R. Civ. P. 59(e) motion arising from a § 2255 proceeding. *Perez v. Sec'y, Fla. Dep't of Corr.*, 711 F.3d 1263, 1264 (11th Cir. 2013). To merit a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating 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).

This Court reviews the denials of Rule 59(e) motions for an abuse of discretion. *See Mincey v. Head*, 206 F.3d 1106, 1137 (11th Cir. 2000). The only

grounds for granting a Rule 59(e) motion are newly discovered evidence or manifest errors of law or fact. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010). A Rule 59(e) motion cannot be used to relitigate old matters, raise argument, or present evidence that could have been raised prior to the entry of judgment. *Id.*

To make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In determining whether counsel gave adequate assistance, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Counsel's performance was deficient only if it fell below the wide range of competence demanded of attorneys in criminal cases. *Id.* at 687. To make such a showing, a defendant must demonstrate that "no competent counsel would have taken the action that his counsel did take." *United States v. Freixas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003) (quotations omitted). Prejudice occurs when 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. Failure to establish either prong is fatal and makes it unnecessary to consider the other. *Id.* at 697.

A movant attempting to show that counsel was constitutionally ineffective for failing to file an appeal "must show that counsel's performance was deficient and that this deficiency prejudiced him." *Thompson v. United States*, 504 F.3d 1203, 1206 (11th Cir. 2007). Counsel acts deficiently when he disregards specific instructions from the defendant to file a notice of appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). However, when a defendant "neither instructs counsel to file an appeal nor asks that an appeal not be taken," the first question to ask is "whether counsel in fact consulted with the defendant about an appeal." *Id.* at 478. In this context, the term "consult" means "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id.* If counsel has consulted with the defendant, he "performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Id.*

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations for filing a § 2255 motion. 28 U.S.C. § 2255(f). The one-year period of limitations typically begins to run on the date the judgment of conviction becomes final. *Id.* § 2255(f)(1). When a criminal defendant does not undertake a direct appeal, his conviction becomes final 14 days after judgment, when the time to appeal his conviction has expired. *See* Fed. R.

App. P. 4(b)(1)(A)(i); *Murphy v. United States*, 634 F.3d 1303, 1307 (11th Cir. 2011).

However, under Fed. R. Civ. P. 15(c)(1)(B), an untimely amendment of a pleading relates back to the date of the original pleading when the claim asserted in the amended pleading arises out of the same conduct, transaction, or occurrence set forth in the original pleading. *See* Fed. R. Civ. P. 15(c)(1)(B). In order to relate back, the claims in the amended petition must be tied to the same common core of operative facts as the claims in the original pleading. *Mayle v. Felix*, 545 U.S. 644, 664 (2005). It is not enough that the claims arose from the same trial, conviction, or sentence. *Id.* "Instead, in order to relate back, the untimely claim must have arisen from the same set of facts as the timely filed claim, not from separate conduct or a separate occurrence in both time and type." *Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000) (quotations omitted). A claim of ineffective assistance of counsel in a timely filed motion does not mean that any claims of ineffective assistance of counsel that are not timely raised necessarily relate back. *See id.* at 1346.

Additionally, The Supreme Court has held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013). However, this exception requires that the

movant "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 1935.

Claim One

In his first claim, Thomas argued that his counsel was ineffective for failing to inform him of the significance of an appeal and misadvising him about the consequences of an appeal. Thomas asserted that counsel did not ask him if he wanted to file an appeal until one day before the deadline to file an appeal. He also stated that counsel advised against an appeal, "notably failing to explain the more favorable standards of review accorded a direct appeal," and failed to tell Thomas that not filing an appeal would deprive him of access to transcripts of his trial and sentencing hearing. Further, Thomas asserted that counsel told him that he would receive additional time on his sentence if he appealed and lost. Thomas stated that he "reluctantly agreed to forego any challenge as a result of counsel's misadvice."

Here, reasonable jurists would not debate the district court's denial of Claim One. Thomas admits that his counsel did ask him if he wanted to file an appeal and provided advice about the consequences of a potential appeal. Thomas did not assert that he told his counsel that he wished to file an appeal and that his counsel had not complied with his request, and it is clear that counsel consulted with Thomas. Accordingly, counsel was not deficient in failing to file an appeal. *Flores-Ortega*, 528 U.S. at 478. Furthermore, counsel was not deficient in his

advice because he correctly advised Thomas that, because he received a substantial downward departure, the government could have filed a cross-appeal that could have resulted in an increased sentence. *See, e.g.*, *United States v. Jayyousi*, 657 F.3d 1085, 1117-19 (11th Cir. 2011). Furthermore, Thomas's counsel's failure to inform Thomas that he would not receive transcripts if he did not appeal, and failure to inform him of specific standards of review, were minor issues that did not fall below the wide range of attorney competence. *Strickland,* 466 U.S. at 687. Accordingly, Thomas has not shown the denial of a constitutional right, and no COA is warranted on this issue.

Claim Two

In his second claim, Thomas argued that counsel was ineffective for failing to challenge the government's warrantless search and resulting inculpatory evidence. He argued that the FBI determined that there was probable cause to search his house and conducted a "knock and talk," during which they received consent to search the house, but that they should have received a search warrant before conducting the search. He asserted that, due to the lack of a warrant, the search was illegal, and counsel should have attempted to suppress the evidence resulting from the search.

As a preliminary matter, Thomas's argument in his motion seeking a COA that the district court erred by not expanding the record to include witness

statements on this issue is meritless because the record shows that the district court granted Thomas's motion to expand the record. Furthermore, reasonable jurists would not debate the district court's denial of Claim Two, as challenging the search would have been fruitless because Thomas consented to the search. The record shows, and Thomas did not contest, that his uncle granted the government consent to enter the house and that Thomas consented to the search of his computer. Thomas did not argue that the consent was inadequate for any reason, but merely argued that the government should have been required to get a search warrant. Consent is an established exception to the search warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967). A search without a warrant does not violate the Fourth Amendment where someone with authority gives voluntary consent. *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797, 111 L. Ed. 2d 148 (1990). Accordingly, challenging the search would have been futile, and Thomas cannot make the requisite showing of prejudice because the results of the proceeding would not have been different. *Strickland*, 466 U.S. at 694. No COA is warranted on this issue.

Claim Three

In Claim Three, Thomas argued that counsel was ineffective for failing to argue that multiple family members and friends had access to the computer on which the illegal pornography was found. He contended that the alternative theory

of the case would have changed the jury verdict. This claim is refuted by the record, which shows that Thomas's counsel did advance that theory of the case, arguing that other people had access to the computer. Accordingly, reasonable jurists would not debate the district court's denial of the claim and no COA is warranted on this issue.

Claim Four

In Claim Four, Thomas argued that his counsel assured him during pretrial preparation that he would have an opportunity to inform counsel of any questions for or challenges to each witness, but that counsel never actually consulted Thomas. Thomas stated that he took notes during the testimony and was concerned about the testimony of government witnesses. He contended that he wanted to ask the government's forensic computer expert about the age of the pornographic files and would have asked about a Dell laptop that was included in the government's forfeiture clause, as well as other unspecified inconsistencies. He argued that this would have likely resulted in a different jury verdict.

Here, reasonable jurists would not debate the district court's denial of Thomas's claim. The district court correctly determined that Thomas could not make the requisite showing of deficient performance and prejudice. As a preliminary matter, the record shows that Thomas's counsel did ask the computer forensic expert whether he could identify the age of the pornographic files.

Furthermore, Thomas cannot show prejudice regarding the other questions that he wished to ask because he cannot show a reasonable probability that, had he asked about an incorrect forfeiture statement and other unspecified inconsistencies, the credibility of the government witnesses would have been so undermined as to affect the outcome of the proceeding. *Id.* Accordingly, no COA is warranted on this issue.

Claim Five

In Claim Five, Thomas argued that counsel was ineffective for failing to challenge the delay between the issuance and execution of the warrant for his arrest, "an unexplained period of five days" in which law enforcement could continue investigating him. The district court did not err in denying this claim on the basis that the challenge would not have been successful. This Court has held that "[b]ecause there is no constitutional right to be arrested, a suspect cannot complain that officers postponed arresting him in order to obtain more incriminating statements or other evidence against him." *United States v. Street*, 472 F.3d 1298, 1309 (11th Cir. 2006). Therefore, a challenge to the five-day delay between the issuance and execution of the arrest warrant would not have been successful, and Thomas cannot show prejudice. No COA is warranted on this issue.

Reply Claims

In his reply, Thomas stated that, in light of the government's response, he wished to abandon Claims Six and Seven from his original § 2255 motion, and that Claims Three and Four were more properly categorized as a single ground of ineffective assistance of counsel for failure "to properly investigate the facts and law relevant to the trial strategy." He argued that he should be entitled to an evidentiary hearing on credibility issues. Thomas also asserted that counsel was ineffective because, instead of putting forward the defense that other people could have had access to the computer, counsel should have: (1) sought suppression of Thomas's confession because "the consensual interview was not quite so consensual"; (2) introduced evidence demonstrating inaccuracies in the investigator's reports and testimony; (3) produced expert testimony to augment the government's admission that they could not be sure when the illegal images were obtained and when or if they had been viewed; and (4) allowed Thomas to testify on his own behalf. Thomas also argued that his due process rights were violated because he was not provided free copies of transcripts.

The district court denied Thomas's reply claims on the basis that they did not relate back to his original motion and were, therefore, untimely. The district court also concluded that, even if they were timely, the claims were due to be denied on the merits as conclusory and unsupported by evidence.

Because Thomas did not file a direct appeal, his conviction became final 14 days after judgment was entered against him. *See* Fed. R. App. P. 4(b)(1)(A)(i); *Murphy*, 634 F.3d at 1307. Therefore, his conviction became final on November 13, 2012. Thomas filed his original § 2255 motion on October 23, 2013, within the one-year AEDPA statute of limitations, but did not file his reply until May 2014. Accordingly, if his reply does not relate back to his original motion, it is untimely. *See* 28 U.S.C. § 2255(f); Fed. R. Civ. P. 15(c)(1)(B). Thomas's new claims that counsel was ineffective for failing to suppress his confession and preventing him from testifying on his own behalf, as well as his new claim that he did not receive transcripts, do not relate back to his original motion. Despite Thomas's attempts to recharacterize his original motion, the claims do not arise from the "same common core of operative facts as the claims in the original pleading." *Mayle*, 545 U.S. at 664, 125 S. Ct. at 2574. Instead, the new claims relate to separate conduct because an ineffective-assistance claim does not encompass all other ineffective-assistance claims for the purposes of relation back. *Davenport*, 217 F.3d at 1344. Nothing in Thomas's original motion referenced his confession, his ability to testify on his own behalf, or the failure to provide transcripts, and, therefore, those claims do not relate back to his original motion and are untimely. The only reply claims that share a common core of operative fact with his original complaint are his claims about questioning government witnesses about inconsistencies and providing

expert testimony about the age of the computer files, which are related to Claim Four in Thomas's original motion.

However, even if all of Thomas's claims did relate back under Rule 15(c) and were timely, they were meritless. Thomas cannot show prejudice on his claims that counsel was ineffective for failing to challenge his confession, failing to ask about inconsistencies in witness testimony, and failing to provide expert testimony, because he has not provided any factual basis for those claims. Beyond a conclusory allegation that his confession was "not so consensual," Thomas has provided no information indicating that counsel could have succeeded in challenging his confession. Furthermore, Thomas has not provided details of any specific testimonial inaccuracies from the government witnesses that would have been sufficient to severely impact their credibility and change the outcome of the trial. Similarly, Thomas has not provided any information about the actual substance of the potential testimony of an expert witness, nor has he shown that he could have presented expert testimony that showed anything beyond the forensic examiner's admission that he could not tell the precise age of the pornographic files. Therefore, he cannot show prejudice because he cannot show that expert testimony would have affected the outcome of the proceedings.

Thomas's allegation that counsel was ineffective for preventing him from testifying at trial is refuted by the record. At trial, Thomas engaged with the court

and stated under oath that he did not want to testify, that he had not been forced or coerced into that decision, and that he made the decision of his own free will. "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). Therefore, Thomas's statements in court refute his claim that his counsel prevented him from testifying on his own behalf. As for Thomas's claim that his due process rights were violated in his habeas proceeding because he did not receive free copies of his transcripts, the Supreme Court has determined that a federal prisoner has no absolute right to a transcript. *See United States v. MacCollom*, 426 U.S. 317, 325-26 (1976) (plurality opinion concluding that 28 U.S.C. § 753(f) is not unconstitutional, even though it requires a § 2255 movant to demonstrate that his claim is not frivolous before the court is required to provide him with a free transcript). Accordingly, his claim is without merit. Because reasonable jurists would not debate their denial, a COA is not warranted for Thomas's reply claims.

Rule 59(e) Motion

In his Rule 59(e) motion for reconsideration, Thomas argued that he did show what witnesses would have testified to because he submitted affidavits from himself, his uncle, and his girlfriend in his motion to expand the record. He also argued that he should not be subject to the statute of limitations because he was actually innocent.

Thomas has not shown that the district court abused its discretion in denying his Rule 59(e) motion because he did not show any newly discovered evidence or manifest errors in law or fact. *See Mincey*, 206 F.3d at 1137; *Jacobs*, 626 F.3d at 1344. Thomas's assertion that he did show what witnesses would have testified to is unavailing because the affidavits that he submitted from himself, his uncle, and his girlfriend did not relate to the issue of what an expert witness would have testified to, which was the only part of the district court's decision that relied on a lack of witness testimony. Furthermore, while actual innocence can provide a reprieve from the statute of limitations, Thomas did not provide any factual support for his actual-innocence claim that would show that a reasonable juror would not have convicted him in light of new evidence. *McQuiggin*, 133 S. Ct. at 1928, 1935. Moreover, while the district court did determine that Thomas's reply claims were untimely, it also concluded that the claims were due to be denied on the merits. Therefore, whether or not the statute of limitations applied did not actually affect the denial of his claims. Accordingly, the district court did not err in denying Thomas's Rule 59(e) motion because he failed to make the requisite showing of error. No COA is warranted on this issue.

CONCLUSION:

Thomas did not show that reasonable jurists would find debatable the denial of his § 2255 petition or his Rule 59(e) motion. Moreover, his argument in his

motion seeking a COA that the district court should have conducted an evidentiary hearing is meritless. A district court is required to hold an evidentiary hearing if a § 2255 movant's "allegations are not affirmatively contradicted by the record and the claims are not patently frivolous." *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002). As shown above, Thomas's allegations were affirmatively contradicted by the record. Because Thomas has not made a substantial showing of the denial of a constitutional right, his motion for a COA is DENIED and his motion for leave to proceed on appeal IFP is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-14955-K

BRANDON KYLE THOMAS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILSON and JULIE CARNES, Circuit Judges.

BY THE COURT:

Brandon Kyle Thomas has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated November 19, 2018, denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed on appeal *in forma pauperis* in the appeal of the district court's denial of his 28 U.S.C. § 2255 motion to vacate sentence and his Fed. R. Civ. P. 59(e) motion to alter or amend judgment. Because Thomas has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.

Appendix "2"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BRANDON KYLE THOMAS,

Petitioner,

v.

CASE NO. 6:13-cv-1678-Orl-28DAB
(6:12-cr-78-Orl-28DAB)

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

This cause is before the Court on a motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 filed by Brandon Kyle Thomas. (Doc. 1). The Government filed a response to the § 2255 motion in compliance with this Court's instructions and with the *Rules Governing Section 2255 Proceedings for the United States District Courts*. (Doc. 6). Petitioner filed a reply. (Doc. 11).

Petitioner alleges seven claims in his motion to vacate, set aside, or correct sentence.[1] For the following reasons, the Court concludes that Petitioner is not entitled to relief.

I. PROCEDURAL HISTORY

Petitioner was charged by Indictment with knowingly distributing or attempting

[1] In his reply, Petitioner concedes that he is not entitled to relief on grounds six and seven. (Doc. 11 at 2). Therefore, the Court will not address those claims. Alternatively, the Court finds that these claims are without merit.

to distribute images depicting child pornography (count one) and possession of images depicting child pornography (count two), in violation of 18 U.S.C. §§ 2252A(a)(2)(B) and (a)(5)(B). (Criminal Case 6:12-cr-78-Orl-28DAB, Doc. 11).[2] After a jury trial, Petitioner was convicted as charged. (Criminal Case Doc. Nos. 37, 38, 42, 57, and 58). The Court conducted a sentencing hearing, and sentenced Petitioner to two concurrent 120-month terms of imprisonment. (Criminal Case Doc. Nos. 51 and 59). Petitioner did not appeal.

II. LEGAL STANDARD

The Supreme Court of the United States, in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense. *Id.* at 687-88.

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

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[2] Hereinafter Criminal Case No. 6:12-cr-78-Orl-28DAB will be referred to as "Criminal Case."

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

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

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

III. ANALYSIS

A. Claim One

Petitioner alleges that trial counsel misadvised him with regard to the significance of filing an appeal. (Doc. 1 at 13). Petitioner states that counsel consulted with him regarding an appeal and told him that if he appealed, he could receive "additional time on his sentence" if he lost the appeal. (*Id.*) Petitioner contends that had counsel advised him regarding the "favorable standard of review" and the fact that he would not receive his transcripts if he failed to appeal, he would have instructed counsel to appeal. *Id.* In his reply, Petitioner also states that counsel failed to explain the law regarding procedural

default and retroactivity. (Doc. 11 at 7).

Petitioner has not demonstrated that he is entitled to relief. According to the Presentence Investigation Report, the recommended guidelines range for sentencing was 188 to 235 months in prison. (Criminal Case Doc. 59 at 5). The Court departed from the recommended range over the Government's objection and sentenced Petitioner to concurrent 120-month terms of imprisonment. (*Id.* at 18, 22). Therefore, had Petitioner filed an appeal, the Government could have filed a cross-appeal. If the Government had been successful in challenging the downward variance, Petitioner faced a significantly greater sentence than the one he received. Thus, counsel's advice with respect to this matter was reasonable, and Petitioner cannot demonstrate deficient performance or prejudice.

Furthermore, Petitioner admits that counsel consulted with him regarding an appeal as is required by federal law. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (holding an attorney must consult with a client about an appeal when either: (1) any rational defendant would want to appeal; or (2) the client reasonably demonstrated an interest in appeal). Although Petitioner contends that counsel did not explain the "standard of review" or the law regarding procedural default or retroactivity, or advise him that he would not receive copies of his transcripts, Petitioner has not shown how counsel's actions resulted in prejudice. Accordingly, this claim is denied.[3]

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[3] Petitioner also contends that he wanted to raise the issue of whether the Government agents' search of his computers was legal. (Doc. 11 at 6). However, as

B. Claim Two

Petitioner contends that trial counsel was ineffective for failing to challenge the warrantless search of his home. (Doc. 1 at 13). The Fourth Amendment protects against warrantless searches and seizures inside a person's home. U.S. Const. amend. IV; *Payton v. New York*, 445 U.S. 573, 586 (1980); *Bates v. Harvey*, 518 F.3d 1233, 1243 (11th Cir. 2008). The warrant requirement, however, has two exceptions: searches made pursuant to consent or under exigent circumstances. *Bates*, 518 F.3d at 1243 (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

During the investigation of this case, Petitioner gave federal agents consent to search his computers. (Criminal Case Doc. Nos. 43-5; 57 at 147-52, 155). Therefore, the warrantless search did not violate the Fourth Amendment. *See Bates*, 518 F.3d at 1243. Counsel's failure to file a motion to suppress on this basis did not amount deficient performance nor did prejudice result because such a motion would not have been meritorious. Accordingly, claim two is denied.

C. Claim Three

Petitioner asserts trial counsel was ineffective for failing to present a defense at trial. (Doc. 1 at 14). Petitioner maintains counsel should have presented the defense that multiple family members had access to the computers in his home. (*Id.*).

This claim is refuted by the record. Defense counsel questioned the Government's

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discussed in relation to claim two, *infra*, Petitioner consented to the search, therefore, no Fourth Amendment violation occurred.

expert witness, Federal Bureau of Investigation ("FBI") Agent Keith Arndt ("Arndt") regarding whether it was possible to determine how many people had access to Petitioner's computer. (Criminal Case Doc. 58 at 21-22, 25-26, 31-32). Additionally, defense counsel called two witnesses, Barbara Neighborhall and Regina Thomas, who testified regarding the number of people who lived in the same home as Petitioner and stated that multiple people had access to the computer where the images were found. (*Id.* at 37, 41-47.). Based on this testimony, defense counsel asserted during closing arguments that the jury should not convict Petitioner because multiple people had access to Petitioner's computer and could have downloaded the illegal images. (*Id.* at 65-67, 70-72, 76-77). Consequently, Petitioner cannot demonstrate deficient performance or prejudice. Claim three is therefore denied.

D. Claim Four

Petitioner alleges trial counsel was ineffective for failing to ask additional questions of witnesses during trial. (Doc. 1 at 15). Petitioner states that he wanted counsel to ask the Government's witness about the age of the incriminating files found on his computer. (*Id.*). Additionally, Petitioner states that counsel should have "brought to light the inconsistencies by the investigating FBI agents," such as the error in the Indictment regarding the forfeiture of his property. (*Id.*). Petitioner contends that the Indictment listed a Dell laptop computer as an item to be forfeited instead of the HP Pavilion desktop computer. (*Id.*). Petitioner argues that had the jury been made aware of the FBI agents' error, it would have "significantly eroded the jury's confidence in the agents[']' veracity.

. . ." (*Id.*).

The first portion of Petitioner's claim is refuted by the record. Defense counsel questioned the Government's expert regarding whether he could determine the date any internet activity took place or when any images were downloaded, and the expert testified that he could not determine when the illegal images were accessed and downloaded. (Criminal Case Doc. 58 at 25-31). Therefore, Petitioner cannot establish deficient performance on the part of counsel, and this claim is denied.

Additionally, Petitioner cannot demonstrate that he is entitled to relief on the second portion of his claim regarding the forfeiture in the Indictment. The investigating agents did not draft the Indictment; this document was drafted by the Office of the United States Attorney. Moreover, the jury was not instructed on, nor did they see the portion of the Indictment related to forfeiture. (Criminal Case Doc. 58 at 83-99). The jury only determined whether Petitioner was guilty of counts one and two of the Indictment. Thus, any questions regarding an error with respect to forfeiture of property was irrelevant to the issues at trial. Furthermore, Petitioner cannot demonstrate prejudice because a reasonable probability does not exist that but for counsel's actions, the result of the proceeding would have been different. Accordingly, this claim is denied.

E. Claim Five

Petitioner alleges trial counsel was ineffective for failing to challenge the five-day delay in the execution of the arrest warrant. (Doc. 1 at 15). Petitioner states that no explanation was given for this delay, and he has "no way of knowing whether the

government used that temporal period to further its investigation or to further build its case in any inappropriate manner." (*Id.*).

Federal courts have noted that the Fourth Amendment rules regarding warrants do not include time limits, however, seizures must be "reasonable" and the "[p]assage of time could affect reasonableness." *United States v. Martin*, 399 F.3d 879, 881 (7th Cir. 2005). Petitioner cannot demonstrate that the five-day delay in executing the arrest warrant was unreasonable. Police officers are "not obligated to make arrests as soon as possible; they may continue investigations in order to acquire additional evidence." *United States v. Stotler*, No. 07-CR-30116, 2008 WL 754118, at *4 (C.D. Ill. Feb. 20, 2008) *report and recommendation adopted as modified*, No. 07-30116, 2008 WL 754117 (C.D. Ill. Mar. 19, 2008) *aff'd*, 591 F.3d 935 (7th Cir. 2010). Additionally, delays of more than one month have been held to be reasonable. *See United States v. Hull*, 239 F. App'x 809, 810 (4th Cir. 2007) (holding a fifty-six-day delay between the issuance and execution of an arrest warrant was not unreasonable); *Auricchio v. Town of DeWitt*, No. 5:10-CV-1072 GTS/ATB, 2013 WL 868261, at *15 (N.D.N.Y. Mar. 7, 2013) (citing *United States v. Wilson*, 342 F.2d 782, 783 (2d Cir.1965) (noting a four and one-half month delay in executing an arrest warrant is not unreasonable)), *aff'd*, 552 F. App'x 95 (2d Cir. 2014).

Petitioner has not demonstrated that counsel's failure to challenge the delay in the execution of the arrest warrant resulted in prejudice as it is not likely that such a challenge would have been successful. Furthermore, his allegation that the Government may have used the five-day delay to build its case is speculative. *Vanholten v. United States*, No. 3:15-

cv-79-Orl-37MCR, 2016 WL 1170981, at *3 (M.D. Fla. Mar. 25, 2016) (citing *Moss v. United States*, No. 8:06-cr-464, 2010 WL 4056032, at *14 (M.D. Fla. Oct. 15, 2010) ("[V]ague, conclusory, speculative or unsupported claims cannot support an ineffective assistance of counsel claim.")). Accordingly, this claim is denied.

F. New Claims

Petitioner also raises several new claims in his reply (Doc. 11 at 9). Petitioner alleges, for the first time, that trial counsel was ineffective for failing to (1) move to suppress Petitioner's confession; (2) introduce evidence demonstrating inaccuracies in the investigator's reports and testimony; and (3) call an expert to testify regarding when the illegal images were downloaded and viewed. (*Id.*). Petitioner also asserts that trial counsel's actions in preventing him from testifying amount to deficient performance. (*Id.*).

Under 28 U.S.C. § 2255(f), Petitioner was allowed one year from the date his judgment of conviction became final to file a motion to vacate, set aside, or correct sentence. Judgment was entered in Petitioner's criminal case on October 30, 2012. Petitioner had fourteen days after Judgment was entered to file a notice of appeal. *See* Fed. R. App. P. 4(b)(1)(A). Petitioner did not file a notice of appeal, therefore, his conviction became final on November 13, 2012. *See Mederos v. United States*, 218 F.3d 1252, 1253 (11th Cir. 2000) (holding that a conviction that is not appealed becomes final when the time allotted for filing an appeal expires). As a result, Petitioner had until November 13, 2013, to file a motion to vacate, set aside, or correct sentence.

Petitioner's motion to vacate, filed on October 23, 2013, was timely filed. However, Petitioner's reply was filed on May 4, 2014. Therefore, the new claims raised in the reply are untimely, and the Court will not consider those claims unless they relate back to the original motion. Fed. R. Civ. P. 15(c); *Mayle v. Felix*, 545 U.S. 644 (2005); *Farris v. United States*, 333 F.3d 1211, 1215 (11th Cir. 2003) (citing *United States v. Davenport*, 217 F.3d 1341, 1344 (11th Cir. 2000)).

Rule 15(c) provides that an untimely claim raised in an amended pleading relates back to the date of the original pleading when the amended claim arises out of the same conduct, transaction, or occurrence as the original claims. Fed. R. Civ. P. 15(c)(1)(B). An amendment that states an entirely new claim for relief based on a different set of facts will not relate back. *Farris*, 333 F.3d at 1215. The fact that the claims arise out of the same trial, conviction, or sentence is insufficient for claims to relate back. *Mayle*, 545 U.S. at 664; *Farris*, 333 F.3d at 1215 ("[T]o relate back, an untimely claim must have more in common with the timely filed claim than the mere fact that they arose out of the same trial or sentencing proceedings."). Rather, the claims must be tied to a common core of operative facts. *Mayle*, 545 U.S. at 664; *Pruitt v. United States*, 274 F.3d 1315, 1319 (11th Cir. 2001).

Although Petitioner's new claims allege ineffective assistance of counsel, they allege instances of deficient performance that are separate in both type and time from the claims initially raised. *See Davenport v. United States*, 217 F.3d 1341 (11th Cir. 2000) (citing *United States v. Craycraft*, 167. F3d 451 (8th Cir. 1999)). Because these new claims are based on different facts than the claims alleged in the initial motion to vacate, set aside, or

correct sentence, the Court will not consider these claims.

Alternatively, the Court concludes that these claims are without merit. Petitioner's claims that counsel should have (1) moved to suppress his confession, (2) introduced evidence demonstrating inaccuracies, and (3) called an expert to testify are conclusory because Petitioner has not alleged any specific facts to support these claims. It is unclear why Petitioner's confession was subject to suppression as Petitioner makes no argument regarding this matter except to say that the "consensual interview was not quite so consensual." (Doc. 11 at 9). Additionally, Petitioner has not alleged what inaccuracies counsel should have corrected.

Moreover, Petitioner has not shown that any witness would have testified in the manner he suggests. "[E]vidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or an affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991) (footnotes omitted); *Dottin v. Sec'y Dep't of Corr.*, No. 8:07-CV-884-T-27MAP, 2010 WL 376639, at *6 (M.D. Fla. Sept. 16, 2010) ("self-serving speculation about potential witness testimony is generally insufficient to support a claim of ineffective assistance of counsel. A petition must present evidence of the witness testimony in the form of actual testimony or an affidavit."). Petitioner's claim is speculative because he has not presented an affidavit from any expert witness. Therefore, Petitioner has not made the requisite factual showing, and his self-serving speculation

will not sustain this claim of ineffective assistance of counsel. Consequently, these claims are denied.

Finally, Petitioner has not shown that trial counsel prevented him from testifying during trial. At trial, the Court advised Petitioner regarding his right to testify. (Criminal Case Doc. 58 at 4-5). Petitioner stated, under oath, that he was not threatened or coerced or intimidated in any way, nor had anyone done anything he considered "wrong or unfair in order to persuade [him]" not to testify. (*Id.* at 5). Petitioner also stated that he made the decision not to testify of his own free will. (*Id.*).

Petitioner's statements to the Court are presumed true, and he has not shown that the Court should overlook his statements. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (stating "the representations of the defendant . . . [at a plea proceeding] constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity."). Thus, Petitioner cannot demonstrate deficient performance on the part of counsel or prejudice. Accordingly, this claim is denied.

Any of Petitioner's allegations not specifically addressed herein are without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner fails to make such a showing. Thus, the Court will deny Petitioner a certificate of appealability.

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

1. Petitioner's motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. 1) is **DENIED.**

2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

3. The Clerk of Court is directed to file a copy of this Order in criminal case number 6:12-cr-78-Orl-28DAB and to terminate the motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Criminal Case Doc. 55) pending in that case.

4. Petitioner is **DENIED** a certificate of appealability.

DONE AND ORDERED in Orlando, Florida, this 29 day of April, 2016.

JOHN ANTOON II
UNITED STATES DISTRICT JUDGE

Copies to:
Brandon Kyle Thomas
Counsel of Record
OrlP-3 3/31