IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13843-E

AARON MICHAEL MURRAY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Aaron Michael Murray is a federal prisoner serving a 200-month sentence after pleading guilty to one count of transportation of child pornography. Mr. Murray seeks a certificate of appealability ("COA") to challenge the District Court's denial of his amended pro se 28 U.S.C. § 2255 motion. He also seeks leave to proceed in forma pauperis ("IFP") on appeal and permission to exceed this Court's page number limitation in his application for a COA. For the reasons set out below, Mr. Murray's request for a COA is denied and his request for permission to proceed

IFP on appeal is denied as moot. However, his request to exceed this Court's page number limitation is granted.

I.

In May 2014, a grand jury returned a superseding indictment charging Mr. Murray with five counts of advertising child pornography, four counts of transportation of child pornography, and two counts of possession of child pornography. Initially, he was represented by Rick Jancha. But in December 2014—two weeks before Mr. Murray's trial was set to begin—Mr. Jancha suffered a massive heart attack. Rajan Joshi, who worked at the same law firm as Mr. Jancha, then entered an appearance on behalf of Mr. Murray, and the District Court rescheduled Murray's trial for June 2015.

Before trial began, though, Mr. Murray entered into a plea agreement with the government. Pursuant to the agreement, Mr. Murray pled guilty to one count of transportation of child pornography. In exchange for Mr. Murray's plea, the government agreed to dismiss the remaining ten counts against him. The government also agreed to recommend a three-level reduction for acceptance of responsibility and not to oppose a sentence at the low end of the calculated Guideline range. The agreement noted, though, that the sentencing court would not be bound by the government's sentencing recommendations.

A summary of the factual basis for the plea was attached to the plea agreement. It recounted that police officers in Texas executed a search warrant at the residence of a 15-year-old minor, who admitted to receiving and possessing child pornography. During an examination of the minor's computer, officers discovered e-mails containing child pornography sent from a gmail.com address belonging to a person who identified himself as "T.P.."[1] Detectives traced the internet protocol ("IP") address used to send the e-mails and discovered it was associated with Mr. Murray's residence.

The factual basis said Mr. Murray had posed as a minor named "T.P." and used the gmail address to communicate with the Texas minor and trade images and videos of child pornography. When law enforcement executed a search warrant at Mr. Murray's residence, they seized an iPod touch from his bedroom and an HP Pavilion laptop from inside his Ford truck. On the iPod, a computer forensic examiner discovered the same gmail account that had been used to contact the Texas minor, along with approximately 216 e-mails and 1,079 chat messages that had been sent or received by Mr. Murray, using the T.P. persona. The device also contained at least 250 images depicting child pornography. Mr. Murray's birthdate was stored on the device under a listing titled "My Birthday."

[1] Although not explicitly identified as such in the factual basis, other parts of the record demonstrate that "T.P." are the initials used to represent "Tyler Peterson."

A search of the laptop revealed "several hundred" images and videos containing child pornography. The images that had been sent by e-mail to the Texas juvenile were discovered on the iPod and the laptop. Pursuant to another search warrant, law enforcement directed Google, Inc. to search the e-mail account officers believed Mr. Murray had used. Evidence from Google showed Mr. Murray had emailed at least 246 images of child pornography, including at least 81 that were sent to the Texas minor.

At the change-of-plea hearing before a Magistrate Judge, Mr. Murray was placed under oath and advised that any testimony he provided could be used against him if he later challenged his plea, conviction, or sentence. He acknowledged he read and understood the plea agreement, discussed it with his attorney, and understood the importance of the plea proceedings. The Magistrate Judge informed Mr. Murray that, if he pled guilty, he would waive his rights to a speedy and public jury trial, to be presumed innocent, to have the government prove his guilt beyond a reasonable doubt, to confront and cross-examine witnesses, to present a defense, and to challenge the way the government had obtained any of the evidence against him.

Mr. Murray acknowledged he faced up to 20 years in prison and would be placed on supervised release and required to register as a sex offender. He also stated he understood the Sentencing Guidelines were advisory and his sentence may be higher than any estimate he may have been given by his attorney.

The Magistrate Judge explained the elements of the offense, and Mr. Murry acknowledged he understood them. Mr. Murray stated he wished to plead guilty and admitted he knowingly transported, using means or facilities of interstate commerce—namely, email by computer using the internet—files containing visual depictions of minors engaged in sexually explicit conduct. Mr. Murray stated he read the entire factual basis of his plea agreement, agreed it was accurate, and had no objections to it. Mr. Murray said he was pleading guilty freely and voluntarily, because he was, in fact, guilty. He then stated he had not been threatened or coerced and no promises had been made to him other than those contained in the plea agreement. Mr. Murray also stated he had sufficient time to discuss his case with Mr. Joshi and was satisfied with his representation.

The Magistrate Judge found Mr. Murry understood the charges against him, understood the possible penalties, and appreciated the consequences of pleading guilty. The Magistrate Judge also found that the stipulated factual basis satisfied the elements of the offense, and Mr. Murray's decision to plead guilty was freely, voluntarily, knowingly, and intelligently made with the advice of competent counsel with whom Murray was satisfied. The Magistrate Judge issued a report and recommendation ("R&R"), recommending that the District Court accept Mr. Murray's guilty plea. Mr. Murray did not object, and the District Court accepted the plea. The District Court set Mr. Murray's sentencing for July 2015.

Weeks later, Mr. Murray retained new counsel—Mr. Brodersen. Before sentencing, Mr. Murray's new attorney filed a motion to withdraw the guilty plea. The motion alleged Mr. Murray's plea was not knowing or voluntary because Mr. Joshi made material misrepresentations that persuaded Murray to enter a guilty plea. Namely, Mr. Murray said Mr. Joshi convinced him that, if he pled guilty, he would face a sentence of 87 to 108 months, but if he proceeded to trial, he would receive a sentence of nearly life in prison. Mr. Murray asserted his plea was coerced and claimed his prior counsel failed to meaningfully review discovery provided by the government to determine the existence of exculpatory information and ignored evidence uncovered by a defense investigator that tended to show he was innocent.

As an attachment to the motion, Mr. Murray filed his own sworn affidavit, which was signed and notarized on May 12, 2015, three days before the change-of-plea hearing. In the affidavit, Mr. Murray stated in part:

> Although I am entering a guilty plea, I am not in fact guilty of these crimes. At this time, I feel that I have no other recourse. I am taking this plea because my attorney, Rajan Joshi, along with his partner, Mark NeJame, insisted that this is my only option. I wanted to plead "no contest[,"] because I absolutely do not want to admit to a crime that [I] did not commit. I was informed by coun[sel] that I could not do this in Federal Court.
>
> [M]y attorney has adamantly insisted on several occasions that this plea is my only option. I have been informed that if I take this to trial, they will not be able to prove my innocence and I will be spending the majority of my adult life incarcerated. The law firm that was hired to prove my innocence has effectively admitted that they are unable and basically unwilling to do this.

Mr. Murray also attached a notarized letter to the judge, dated May 22, 2015, in which he reiterated he only accepted the guilty plea because he was afraid of spending the rest of his life in prison. He said Mr. Joshi coerced him into taking the plea "for the sole purpose of removing [the case] from his caseload before leaving the NeJame Law Firm."

Mr. Murray also attached a notarized letter written by his mother, who stated she believed her son "was practically forced into taking the plea, simply because it was the easiest on the law firm to make []his case go away." A sworn and notarized letter from Mr. Murray's father contained substantially the same allegations against Mr. Joshi and his firm, including that Mr. Joshi had repeatedly stated that "the most likely outcome would be a conviction." Finally, Mr. Murray attached a sworn statement by Robert Gonzalez, a forensic analyst hired while Mr. Jancha was serving as lead counsel. Mr. Gonzalez stated he provided information about the case to Mr. Jancha that exculpated Mr. Murray, and, although this information was provided in discovery, it was "never properly explored."

The government responded that Mr. Murray should not be permitted to withdraw his plea because his sworn statements at the change-of-plea hearing belied his assertions that his plea was involuntary. The government also contended Mr. Murray's claim his counsel rendered ineffective assistance was without merit.

The District Court held a hearing on Mr. Murray's motion, during which Murray maintained his plea was involuntary and argued his sworn statement was sufficient to rebut the presumption that his statements at the plea hearing were true. Although invited by the District Court to present live testimony, Mr. Murray's counsel elected to rely on the written affidavits. The District Court denied the motion, noting the plea colloquy was very thorough and Mr. Murray did not hesitate in answering the Magistrate Judge's questions. The District Court found Mr. Murray's sworn statements in his motion to withdraw and supporting affidavit were "utterly belied by the plea colloquy" and "no more than a poorly-camouflaged and calculated attempt to balance [his] sentencing risk." Accordingly, the Court gave the statements "no evidentiary weight or value," and instead completely credited the testimony given by Mr. Murray under oath and in front of the Magistrate Judge.

The District Court also determined Mr. Gonzalez's affidavit was "completely conclusory and not supported by anything else in the record." The District Court noted that Mr. Gonzalez's sworn statement did not rebut several of the admissions Mr. Murray made under oath before the Magistrate Judge, including that he had used the "T.P." email account to send the Texas minor images depicting child pornography. In light of these credibility determinations, the District Court found Mr. Murray enjoyed the close assistance of counsel throughout his case and his plea was knowing and voluntary.

The case proceeded to sentencing. The Presentence Investigation Report ("PSI") assigned Mr. Murray a base offense level of 22. Two levels were then added because the material involved a prepubescent minor under the age of 12. In addition, six levels were added because the offense involved distribution to a minor that was intended to persuade the minor to engage in illegal activity. Four levels were added because the offense involved material portraying sadistic or masochistic conduct or other depictions of violence. Two levels were added because the offense involved the use of a computer. Finally, five levels were added because the offense involved more than 600 images and videos containing child pornography. Specifically, the PSI noted that 1,075 images were involved. The offense level was then reduced by three levels for Mr. Murray's acceptance of responsibility. Based on an offense level of 38 and a criminal history category of I, his Sentencing Guideline range was 235 to 293 months imprisonment. However, because the statutory maximum sentence was 240 months, the guideline range was reduced to 235 to 240 months.

At sentencing, Mr. Brodersen objected to the enhancement for the number of images involved in the offense, arguing that only the 81 images sent to the Texas minor, rather than the 1,075 total images discovered on the laptop and iPod, should be attributed to Mr. Murray. Mr. Brodersen also argued that the enhancement for material portraying sadistic or masochistic conduct was inappropriate, because no such images were transmitted to the Texas minor. The District Court overruled both

objections and adopted the facts contained in the PSI and the Sentencing Guideline calculation. The District Court then sentenced Mr. Murray to 200 months in prison, followed by 20 years of supervised release.

On direct appeal, Mr. Murray's court-appointed counsel moved to withdraw pursuant to Anders v. California, 386 U.S. 738, 739, 87 S. Ct. 1396, 1397 (1967). Mr. Murray responded, arguing: (1) his counsel was ineffective for failing to investigate, failing to properly communicate, and advising him to plead guilty; (2) his guilty plea was involuntary; and (3) the District Court erred in denying his motion to withdraw the guilty plea. This Court granted counsel's motion to withdraw and affirmed Mr. Murray's conviction and sentence, concluding there were no issues of arguable merit. See United States v. Murray, 671 F. App'x 747, 748 (11th Cir. 2016) (per curiam) (unpublished).

Thereafter, Mr. Murray filed a pro se 28 U.S.C. § 2255 motion, which he later amended. Mr. Murray's amended motion argued:

> (1) his counsel rendered ineffective assistance by coercing him into pleading guilty, failing to properly investigate and prepare a valid defense based on forensic evidence, and failing to object to the Presentence Investigation Report;
>
> (2) his counsel was ineffective for failing to request a competency evaluation;
>
> (3) his counsel was ineffective for erroneously advising him that, if he pled guilty, he would receive a sentence of five to six years imprisonment;

(4) his counsel was ineffective for failing to investigate exculpatory evidence;

(5) law enforcement officials deliberately withheld exculpatory evidence, in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), and his counsel was ineffective for failing to locate such evidence;

(6) counsel was ineffective for failing to challenge the false or fabricated testimony of two law enforcement officials at the grand jury and bond hearings; and

(7) his sentence was unconstitutional, because his plea was involuntary, the District Court erroneously calculated his Guideline range, and his counsel rendered ineffective assistance by failing to object to improper enhancements.

After the government responded and Mr. Murray replied, the District Court issued an order denying the § 2255 motion. The District Court first determined that Mr. Murray's plea was voluntarily entered and his "subsequent protestations of innocence and claims that he did not want to enter a guilty plea but felt forced to do so, [were] unworthy of credit." The Court also observed that, even assuming Mr. Joshi had advised that Mr. Murray would likely be found guilty at trial and would then face life in prison, such advice was reasonable and did not amount to coercion. The Court also found that Mr. Murray's assertions about possible exculpatory evidence and fabrication by law enforcement were "confusing, ambiguous, and speculative." The Court determined this alleged evidence failed to overcome his heavy burden of demonstrating his sworn statements at the plea hearing were false.

The Court also concluded Mr. Murray did not clearly state what objections Mr. Brodersen should have made to the PSI, and Mr. Brodersen did indeed make several objections. To the extent that Mr. Murray attempted to argue counsel should have objected to the sentencing court's judicial factfinding, the District Court found the claim was without merit. For these reasons, the District Court reasoned Claims 1, 4, 5, and 6 were without merit.

Regarding Claim 2, the District Court found Mr. Murray had not presented any evidence that a mental evaluation was warranted or would have been helpful to his case. As to Claim 3, the Court found that, even assuming Mr. Joshi had predicted Mr. Murray would receive a sentence of only five to six years in prison, such a prediction did not amount to deficient performance, and, regardless, Mr. Murray could not establish prejudice because he was informed of his sentencing exposure at the plea hearing and he could not show that with proper advice he would have proceeded to trial on the original eleven charges. The District Court also found that Claim 7 was without merit because Mr. Brodersen had raised most, if not all, of the sentencing arguments Mr. Murray raised in his § 2255 motion, and, therefore, Murray could not demonstrate deficient performance at sentencing. The District Court also stated any claims not specifically mentioned in the order were found to be without merit. The District Court denied Mr. Murray a COA and leave to proceed IFP on appeal.

Mr. Murray now seeks a COA on all of his claims and leave to proceed IFP on appeal. He asserts that the District Court erred in failing to hold an evidentiary hearing before denying his § 2255 motion and in failing to address all of the more than "twenty-seven different specific actions or inactions that violated his Sixth Amendment right to effective assistance of counsel." Mr. Murray also filed a separate "Motion to Exceed Page Limitation," which asks this Court to permit him to exceed the page limitation for his COA motion and supporting brief.

II.

A.

Under 28 U.S.C. § 2255, a prisoner in federal custody may move a court to vacate, set aside, or correct a sentence imposed in violation of the Constitution or federal statutory law. "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, [and] determine the issues and make findings of fact and conclusions of law with respect thereto." Id. However, the movant must allege reasonably specific, non-conclusory facts that, if true, would entitle him to relief. Otherwise, no evidentiary hearing is warranted. See Aron v. United States, 291 F.3d 708, 715 n.6 (11th Cir. 1999).

If a district court has dismissed or denied a § 2255 motion, a movant must receive a certificate of appealability before he will be permitted to challenge the

decision. To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected the constitutional claims on the merits, the movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or "that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000) (quotation marks omitted).

In addition, the movant's claims must not be procedurally barred. "Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding. Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004). "This rule generally applies to all claims, including constitutional claims." Id. But a defendant can avoid a procedural bar by establishing either (1) "cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error," or (2) that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Id. (quotation marks omitted).

A claim may also be procedurally barred if a defendant asserted it on direct appeal, and this Court rejected it. See Stoufflet v. United States, 757 F.3d 1236, 1239 (11th Cir. 2014); see also Rozier v. United States, 701 F.3d 681, 684 (11th Cir.

2012) ("At least where there has been no intervening change in controlling law, a claim or issue that was decided against a defendant on direct appeal may not be the basis for relief in a § 2255 proceeding."). This Circuit regards issues raised on direct appeal by a prisoner in a pro se response to appointed counsel's motion to withdraw under Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), as raised for purposes of § 2255. See Stoufflet, 757 F.3d at 1242. "We may affirm the denial of § 2255 motion for any reason supported by the record, even if it was not relied upon by the district court." King v. United States, 723 F. App'x 842, 843 (11th Cir. 2018) (per curiam) (unpublished).

B.

Most of Mr. Murray's § 2255 claims alleged his plea counsel rendered ineffective assistance. During plea negotiations defendants are "entitled to the effective assistance of competent counsel." McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970). To establish ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient, and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064–65 (1984); see also Hill v. Lockhart, 474 U.S. 52, 57, 106 S. Ct. 366, 369–70 (1985) (applying the two-part Strickland test to challenges to guilty pleas based on ineffective assistance of counsel). Deficient performance means counsel's representation fell below an objective standard of

reasonableness, and "no competent counsel would have taken the action that his counsel did take." Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064; United States v. Freixas, 332 F.3d 1314, 1319-20 (11th Cir. 2003) (quotations omitted).

"Where the petitioner bases counsel's deficiency on his failure to investigate exculpatory evidence, [this Court] consider[s] the likelihood that counsel would have changed the plea recommendation as a result of the investigation." Martinez v. Sec. Fla. Dep't of Corr., 684 F. App'x 915, 922–23 (11th Cir. 2017). "The duty to investigate particular facts or defenses is . . . not absolute, but counsel's decision not to investigate must be reasonable under the circumstances." Id. at 923. "Counsel's performance is deemed to be deficient only if the petitioner can show that 'no competent attorney' would have failed to pursue the defense, given the facts known to counsel at the time." Id.

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 693–94, 104 S. Ct. at 2067–68. A "reasonable probability" is one sufficient to undermine confidence in the outcome. Id. In a case where the defendant accepted a guilty plea, he must establish prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill, 474 U.S. at 59, 106 S. Ct. at 370.

III.

As a preliminary matter, the Court considers Mr. Murray's "Motion to Exceed Page Limitation." The Federal Rules of Appellate Procedure generally require that a motion not exceed 5,200 words or 20 pages. See Fed. R. App. P. 27(d)(2). However, in the interest of efficiency, the Court will consider Mr. Murray's entire motion although it exceeds this page limitation. Mr. Murray's "Motion to Exceed Page Limitation" is granted.

IV.

The Court next considers Mr. Murray's argument he is entitled to a COA on his claim that the District Court failed to address several arguments he made in his § 2255 motion. Under this Circuit's precedent, a district court must resolve all claims for relief raised in a § 2255 motion, regardless of whether habeas relief is granted or denied. See Clisby v. Jones, 960 F.2d 925, 936 (11th Cir. 1992) (en banc) (addressing § 2254 petitions); see also Rhode v. United States, 583 F.3d 1289, 1291 (11th Cir. 2009) (extending Clisby to § 2255 motions). "A claim for relief for purposes of this instruction is any allegation of a constitutional violation." Clisby, 960 F.2d at 936. "A habeas petitioner must present a claim in clear and simple language such that the district court may not misunderstand it." Dupree v. Warden, 715 F.3d 1295, 1299 (11th Cir. 2013).

Mr. Murray argues the District Court failed to address all of the more than "twenty-seven different specific actions or inactions" that violated his Sixth Amendment right to effective assistance of counsel, including whether his counsel (1) failed to conduct a meaningful investigation; (2) had a conflict of interest; (3) failed to interview an alibi witness; (4) incorrectly told Mr. Murray that he was facing a life sentence if he went to trial; (5) withheld a forensic report from Mr. Murray, which contained exculpatory evidence; (6) failed to correctly file subpoenas; and (7) "refus[ed] to withdraw the plea." However, a review of the District Court's order reveals it did, in substance, address all of the constitutional claims asserted in Mr. Murray's § 2255 motion. The District Court elected to group many of Mr. Murray's claims into "related subsets" for efficiency. This was not Clisby error. Cf. Rodriguez v. United States, 718 F. App'x 886, 890 (11th Cir. 2017) (per curiam) (unpublished) (concluding a district court did not violate Clisby by resolving an overarching issue common to more than one claim and "treating that issue as effectively dispositive" of more than one claim).

In any event, the District Court expressly stated that any issue not specifically addressed in its order was without merit. Because the record shows there is no merit to Mr. Murray's many claims, the District Court was not required to provide a detailed resolution of each factual allegation underlying Murray's claims. See Broadwater v. United States, 292 F.3d 1302, 1303 (11th Cir. 2002) (per curiam)

("[T]here are undoubtedly simple § 2255 motions which obviously have no merit because the allegations, even if true, would not afford relief."). Mr. Murray is not entitled to a COA on his claim of Clisby error.

V.

The Court next considers Mr. Murray's requests for a COA on each of the claims asserted in his § 2255 motion.

A.

In Claim 1, Mr. Murray asserted that his counsel rendered ineffective assistance in a host of ways. However, because Mr. Murray already brought—and this Court already resolved—all but one of the grounds set out in Claim 1 on direct appeal, most of the grounds alleged are procedurally barred. As for the one ground that is not procedurally barred, reasonable jurists would not otherwise debate the District Court's resolution of it.

In his § 2255 motion, Mr. Murray asserted that his plea counsel refused to adequately review forensic evidence and failed to timely seek subpoenas for time-sensitive electronic records that would have showed someone other than him accessed the e-mail account used to transmit child pornography. Similarly, Mr. Murray alleged that, if Mr. Joshi had read the expert report prepared by Mr. Gonzalez, he would have discovered there were "inconsistencies" in electronic records, which would have cast doubt on whether Murray was the person accessing

the e-mail account. Mr. Murray also said his counsel forced him into a plea deal so the case would be finished before counsel left his law firm and that doing so presented a "conflict of interest."

Mr. Murray asserted these same claims on direct appeal in his response to his counsel's Anders brief. Ordinarily, this Court prefers to defer resolution of ineffective assistance of counsel claims until the § 2255 stage. See United States v. Patterson, 595 F.3d 1324, 1328 (11th Cir. 2010). But "[i]f the record is sufficiently developed, . . . this court will consider an ineffective assistance of counsel claim on direct appeal." United States v. Bender, 290 F.3d 1279, 1284 (11th Cir. 2002). Mr. Murray's own response on direct appeal set out the same evidence he relies on now and stated he discovered that evidence of his counsel's purported ineffectiveness before he moved to withdraw his plea, and, thus, well before direct appeal. In addition, the panel on direct appeal had before it the transcript of the District Court's hearing on Mr. Murray's motion to withdraw his plea. During that hearing, the District Court invited Mr. Murray to call any available witnesses—including his prior counsel—to discuss his allegations of ineffectiveness. Mr. Murray declined to do so, electing instead to rely solely on the affidavits he submitted in support of his motion. To the extent there were deficiencies in the record regarding prior counsel's effectiveness at the plea stage, they were the result of Mr. Murray's decision not to further supplement the record even though the evidence was available to him at the

time. Contra, e.g., Linton v. United States, 712 F. App'x 920, 923 (11th Cir. 2017) (per curiam) (unpublished) (concluding a § 2255 petitioner was not procedurally barred from raising an ineffective assistance of counsel claim because, even though he raised the same claim on direct appeal, evidence supporting the claim was not available at the time of direct appeal).

The record before this Court on direct appeal was sufficient to resolve Mr. Murray's claims. The panel rejected Mr. Murray's claims when it concluded its "independent examination of the entire record reveal[ed] no arguable issues of merit." Murray, 671 F. App'x at 748. Therefore, these claims are procedurally barred. See Stoufflet, 757 F.3d at 1242.

In Claim 1, Mr. Murray also alleged, without further explanation that his counsel was ineffective for failing to challenge the "unconstitutional enhancements" in the PSI, despite requests to do so. Reasonable jurists would not debate the District Court's rejection of this claim. Mr. Murray did not specifically identify in his petition which enhancements should have been objected to, or why they were erroneous. Furthermore, Mr. Brodersen did indeed object to two of the enhancements. Mr. Murray has not alleged facts sufficient to show deficient performance or prejudice. Mr. Murray is not entitled to a COA on any ground asserted in Claim 1.

B.

In Claim 2, Mr. Murray asserted that Mr. Joshi was ineffective for failing to request a competency evaluation, since he was a first-time offender and was only 19 years old at the time of his arrest. Reasonable jurists would not debate the District Court's rejection of this claim. Mr. Murray did not allege any facts indicating his counsel had reason to believe that he was incompetent, such that a reasonable attorney would have pursued a mental evaluation. Accordingly, he failed to demonstrate deficient performance. In addition, because Mr. Murray did not allege any facts demonstrating that a mental evaluation would have resulted in him being declared incompetent, he has not established prejudice. Reasonable jurists could not debate this result. Mr. Murray is not entitled to a COA.

C.

In Claim 3, Mr. Murray asserted that Mr. Joshi was ineffective for erroneously advising him that, if he pled guilty, he would receive a sentence of five to six years in prison. In support of this Claim, Mr. Murray attached an email from Mr. Joshi to his mother. The email set out what Mr. Joshi called his "professional estimate" of Mr. Murray's Guideline range. In it, Mr. Joshi stated explicitly that "the actual guidelines will be determined by the probation off[icer] who conducts a pre-sentence investigation and it [is] the Judge[']s final decision on what the guidelines are."

Nowhere in the email did Mr. Joshi promise a particular sentence in exchange for Mr. Murray's plea, and, in fact, Joshi correctly informed Murray that the Probation Office would recommend a Sentencing Guideline range and the sentencing court would ultimately decide the correct range. Thus, the record affirmatively contradicts any claim that this email shows counsel made a promise as to Mr. Murray's sentence. Cf. Aron v. United States, 291 F.3d 708, 715 (11th Cir. 2002) ("[A] district court is not required to hold an evidentiary hearing where the petitioner's allegations are affirmatively contradicted by the record."). Mr. Murray's allegations are otherwise unsupported by anything in the record. Because Claim 3 offered "nothing more than mere conclusory allegations," Lynn v. United States, 365 F.3d 1225, 1239 (11th Cir. 2004), the District Court did not err in denying the motion as to this claim and reasonable jurists would not debate its resolution. Mr. Murray is not entitled to a COA on this Claim.

D.

In Claim 4, Mr. Murray alleged his counsel was ineffective for failing to investigate evidence that showed his innocence, including records indicating someone other than Murray logged into the "Tyler Peterson" Facebook account. Because Mr. Murray made this same argument—supported by the exact same evidence—on direct appeal and this Court found no merit to it, he is procedurally barred from bringing it in his § 2255 motion. See Stoufflet, 757 F.3d at 1242.

Reasonable jurists could not debate this result. Therefore, Mr. Murray is not entitled to a COA on Claim 4.

E.

In Claim 5, Mr. Murray alleged that one of the detectives involved in the investigation, Michael Miller, "set out to clog the gears of the judicial process" by failing to turn over exculpatory material in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Mr. Murray appears to argue Detective Miller possessed audio recordings of interviews he conducted with a teenager who lived near Murray that would back Murray's "theory of how the evidence was discovered on the devices." Mr. Murray also says Detective Miller warned the neighbor that there would be an investigation into his involvement in Murray's case, giving the teenager "several hours to hide or destroy evidence." Additionally, Mr. Murray alleged his counsel was ineffective because he failed to acquire this evidence.

First, even assuming Detective Miller possessed and withheld this alleged evidence, he was not required to turn it over before Mr. Murray entered his guilty plea. In United States v. Ruiz, 563 U.S. 622, 122 S. Ct. 2450 (2002), the Supreme Court held there is no constitutional requirement for the government to disclose all impeachment evidence in advance of a guilty plea. Id. at 629, 122 S. Ct. at 2455. Because Ruiz squarely forecloses Mr. Murray's claims regarding Detective Miller, Murray is not entitled to a COA on this ground. In any event, Mr. Murray's claim

is procedurally barred because he brought it on direct appeal—based on the same evidence he relied on in his § 2255 motion—and this Court already rejected it.

Second, Mr. Murray is not entitled to a COA on his claim that his counsel should have acquired this evidence from Detective Miller. It appears this claim was raised on direct appeal as a failure-to-investigate claim, relying on this same evidence. It is therefore procedurally barred. Even if it were not procedurally barred, the District Court did not err in denying Mr. Murray's motion on this claim. "Where the petitioner bases counsel's deficiency on his failure to investigate exculpatory evidence, [this Court] consider[s] the likelihood that counsel would have changed the plea recommendation as a result of the investigation." Martinez, 684 F. App'x 915 at 922–23. "Counsel's performance is deemed to be deficient only if the petitioner can show that 'no competent attorney' would have failed to pursue the defense, given the facts known to counsel at the time." Id. at 923. Reasonable jurists would not find debatable the question of whether Mr. Murray's plea counsel was ineffective for failing to secure audio recordings from Detective Miller before advising Murray to plead guilty based the government's evidence. Mr. Murray is not entitled to a COA on Claim 5.

F.

In Claim 6, Mr. Murray asserted that law enforcement officers falsely testified before the grand jury and at the bond hearing that the HP laptop

containing incriminating evidence belonged to Murray and was found inside his truck. Mr. Murray says that, in reality, the laptop was shared among all of the people living in Murray's house. Because Mr. Murray asserted this same claim—relying on the very same evidence—on direct appeal, he is procedurally barred from bringing it again. See Stoufflet, 757 F.3d at 1242. Reasonable jurists could not debate this resolution. Mr. Murray is not entitled to a COA on Claim 6.

G.

In Claim 7, Mr. Murray asserted that his sentence was unconstitutional, and his counsel was ineffective for failing to challenge it. Specifically, he argued that: (1) his sentence was "overly draconian and harsh;" (2) his sentence was overly severe, in violation of the Eighth Amendment, given that he was a first-time offender and was only 19 years old; (3) the facts supporting the enhancements were not proved to a jury beyond a reasonable doubt, in violation of the Sixth Amendment; (4) the conditions of his supervised release were unusually harsh, as they prevented him from using any device that can connect to the internet, which would interfere with his ability to pursue education, employment, or lead a normal life once released.

Mr. Murray also asserted that the District Court committed procedural error in calculating the Guideline range, because: (1) he was convicted of sending only 3 images; (2) "only non-sadistic images were sent to the Texas juvenile;" (3) the Texas juvenile was already engaged in illegal distribution of child pornography before

contacting "Tyler Peterson;" (4) the indictment did not refer to any children under 12, and the detective who opined in case reports that the images involved younger children was "not a pediatric endocrinologist, who has scientific, technical, or other specialized knowledge to reliabl[y] state a fact about the age of a minor."

Because Mr. Murray did not assert any of these claims on direct appeal, they are presumptively procedurally barred. See Lynn, 365 F.3d at 1234. Mr. Murray has not demonstrated that either exception to the procedural bar applies because he has not shown cause for failing to advance these arguments and he has not shown any constitutional violation, let alone one that likely resulted in the conviction of one who is actually innocent. See id. In any event, the District Court's rejection on the merits of each of these arguments is beyond reasonable debate. Therefore, Mr. Murray is not entitled to a COA on Claim 7.

H.

Apart from the seven previously discussed claims, Mr. Murray generally asserted that his plea was not knowingly and voluntarily entered. For a plea to be knowing and voluntary, (1) the guilty plea must be voluntary and free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of the plea. United States v. Symington, 781 F.3d 1308, 1314 (11th Cir. 2015). The representations of the defendant at the plea hearing, as well as any findings made by the judge accepting

the plea, "constitute a formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 74 (1977). This Court applies a "strong presumption" that statements made by a defendant during the plea colloquy are true. United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994). Therefore, "when a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false." United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988).

Here, Mr. Murray argued on direct appeal that his plea was not knowing and voluntary. This Court found no merit to that argument. Therefore, he is procedurally barred from raising the claim in his § 2255 motion. But, in any event, reasonable jurists would not debate Mr. Murray's guilty plea was voluntary. At the change-of-plea hearing, Mr. Murray explicitly stated, under oath, that he had read and understood the plea agreement, understood that he was waiving certain rights by pleading guilty, understood his full sentencing exposure and the consequences of his conviction, and understood the elements of the offense. He also explicitly stated that he was pleading guilty voluntarily, had not been coerced or promised anything, and had no concerns or complaints about the quality of his counsel's representation. The District Court credited this testimony and rejected Mr. Murray's assertions he was coerced into pleading guilty when it rejected Murray's motion to withdraw his plea.

Mr. Murray has not identified any deficiencies in Mr. Joshi's performance or advice that render the guilty plea involuntary. Even assuming Mr. Joshi advised Mr. Murray he was likely to be convicted if he proceeded to trial, Murray has not alleged facts demonstrating such advice was deficient. Before entering his plea, Mr. Murray faced five counts of advertising child pornography (statutory minimum sentences of 15-years imprisonment), four counts of transportation of child pornography (statutory minimums of 5 years), and two counts of possession of child pornography (statutory maximums of 20 years). See 18 U.S.C. §§ 2551(e), 2552(b). Given that Mr. Murray faced a substantial sentence if convicted of all (or even many) of these counts, Mr. Joshi's advice to plead guilty was not unreasonable.

VI.

Finally, the Court considers Mr. Murray's argument he is entitled to a COA on his claim that he should have received an evidentiary hearing on his § 2255 motion. Under 28 U.S.C. § 2255, a district court must grant an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Because the record conclusively shows Mr. Murray was not entitled to relief on any of his claims, the District Court did not err in refusing to grant an evidentiary hearing. Reasonable jurists could not debate this result. Mr. Murray is therefore not entitled to a COA on this issue.

VII.

As explained above, Mr. Murray's motion to exceed this Court's page limitation is **GRANTED**. All of the pages he filed were considered in addressing his COA motion. His motion for a COA is **DENIED**, and his motion for leave to proceed IFP is **DENIED AS MOOT**.

Barbara B. Martin
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13843-E

AARON MICHAEL MURRAY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: MARTIN and ROSENBAUM, Circuit Judges.

BY THE COURT:

Aaron Michael Murray has filed a motion for reconsideration of this Court's order dated June 19, 2019, denying his motions for a certificate of appealability and leave to proceed *in forma pauperis* in his appeal of the district court's denial of his 28 U.S.C. § 2255 motion to vacate. Upon review, Murray's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

AARON MURRAY,

Petitioner,

v. Case No: 5:17-cv-232-Oc-22PRL

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

This cause comes before the Court on Aaron Murray's ("Petitioner's" or "Murray's") amended 28 U.S.C. § 2255 motion to vacate, set aside, or correct an illegal sentence and supporting memorandum of law (Doc. 7; Doc. 8, filed August 24, 2017). Respondent filed a response in opposition to the § 2255 motion (Doc. 11), and Murray filed a reply (Doc. 22). The motion is now ripe for review. Upon review of the pleadings and the record from Murry's criminal proceedings, the Court concludes that Murray's § 2255 motion must be denied.

I. Background and Procedural History[1]

On June 26, 2013, in criminal case number 5:13-cr-49-Oc-22PRL, a federal grand jury in Ocala, Florida returned an indictment charging Murray with three counts of knowingly distributing child pornography and one count of possession of child

[1] Pleadings in Murray's underlying criminal case will be cited as (Cr. Doc. __). A detailed procedural history of Murray's criminal case prior to his guilty plea is set forth in this Court's July 2, 2015 order denying his motion to withdraw his plea (Cr. Doc. 101).

pornography, in violation of 18 U.S.C. §§ 2252A(a)(2)(B) and (5)(B) (Cr. Doc. 10). On May 15, 2014, the grand jury returned an eleven-count superseding indictment charging Murray with five counts of advertising child pornography, in violation of 18 U.S.C. § 2251(d)(1)(A), four counts of transportation of child pornography, in violation of 18 U.S.C. § 2252(a)(1), and two counts of knowing possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) (Cr. Doc. 31).

Murray entered into an agreement with the government to plead guilty to one count of transportation of child pornography (count seven) (Doc. 86).[2] Pursuant to the plea agreement, the remaining counts were dismissed (*Id.* at ¶ 4). A change of plea hearing was held before Magistrate Judge Phillip R. Lammens ("Judge Lammens") on

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[2] Count seven of the superseding indictment reads:

> On or about October 1, 2012 at 3:02 p.m., in Lake County, in the Middle District of Florida, and elsewhere, defendant herein, did knowingly transport and ship, using a means and facility of interstate and foreign commerce, that is, by computer, via the internet, visual depictions, the production of which involved the use of a minor engaging in sexually explicit conduct, which visual depictions were of such conduct, and which visual depictions are specifically identified in the following computer files, among others:
>
> 1. "I(6).jpg";
> 2. "1282421620874.jpg"; and
> 3. "[001844].jpg."
>
> In violation of Title 18, United States Code, Sections 2252(a)(1) and 2252(b)(1).

(Cr. Doc. 31 at 5-6).

May 15, 2015 (Cr. Doc. 80, 94). After conducting a thorough plea colloquy, Judge Lammens issued a report and recommendation finding:

> After cautioning and examining the Defendant under oath concerning each of the subjects mentioned in [Federal Rule of Criminal Procedure] 11, I determine that the guilty plea was knowledgeable and voluntary and that the offense charged is supported by an independent basis in fact containing each of the essential elements of such offense. I therefore recommend that the plea of guilty be accepted and that the Defendant be adjudged guilty and have sentence imposed accordingly.

(Cr. Doc. 82). Neither party filed an objection to the report and recommendation. This Court accepted Murray's guilty plea and adjudged him guilty on June 2, 2015 (Cr. Doc. 87).

On June 23, 2015, Murray filed a motion to withdraw his guilty plea (Cr. Doc. 92). In the motion, Murray asserted that his attorneys "utterly failed to provide him with close assistance of counsel such that his guilty plea was not knowing and voluntary." (*Id.* at ¶ 6). Murray alleged:

> Specifically, Mr. MURRAY asserts that he was coerced by his prior counsel to plead guilty to Count Seven of the Superseding Indictment because his counsel affirmatively convinced him that if he pleaded guilty the Court would sentence him to 87-108 months of imprisonment and that if he proceeded to trial he would receive a sentence of nearly life imprisonment. [fn] This affirmation by his prior counsel resulted in Mr. MURRAY believing that he had no choice but to admit to a crime that he did not commit both in the Plea Agreement and presumably during the plea colloquy conducted by U.S. Magistrate Judge Lammens.
>
> [fn] As it turns out, Mr. MURRAY is facing a guideline sentence in the 235-240 month range based on his guilty plea.

> Additionally, Mr. MURRAY contends that his prior counsel did not provide him with close assistance prior to coercing him into entering the guilty plea when counsel failed to meaningfully review the discovery provided by the Government to determine the existence of exculpatory information and materials and even ignored information developed by its own forensic examiner that tended to demonstrate his innocence.

(Cr. Doc. 92 at ¶¶ 7-8) (citations to attached documents omitted). Murray attached two affidavits to his motion to withdraw in which he urged that he was not guilty and that he was forced to enter his guilty plea because defense counsel was unable and unwilling to defend his case (Cr. Doc. 92-1; Cr. Doc. 92-2). A hearing was held on the motion on June 29, 2015, after which the Court orally denied the motion to withdraw (Cr. Doc. 145). In a following written order, the Court explained that Murray's affidavits were "utterly belied" by the plea colloquy, and "gave no evidentiary weight or value to either of [his] affidavits." (Cr. Doc. 101). The Court concluded that Murray enjoyed the close assistance of counsel throughout his case and that his plea was knowing and voluntary (*Id.* at 11, 15).

After holding a sentencing hearing on July 23, 2015, the Court sentenced Murray to a below-guidelines sentence of 200 months in prison (Cr. Doc. 110). Murray's conviction and sentence were affirmed on direct appeal (Cr. Doc. 151).

II. Legal standards

a. Standard of Review under 28 U.S.C. § 2255

Title 28 U.S.C. § 2255 provides federal prisoners with an avenue for relief under limited circumstances:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). If a court finds a claim under § 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.* at § 2255(b). To obtain this relief on collateral review, a petitioner must clear a significantly higher hurdle than exists on direct appeal. *See United States v. Frady*, 456 U.S. 152, 166 (1982) (rejecting the plain error standard as not sufficiently deferential to a final judgment).

b. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, Murray must show that: (1) "counsel's representation fell below an objective standard of reasonableness"; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). These two elements are commonly referred to as *Strickland*'s performance and prejudice prongs. *Reece v. United States*, 119 F.3d 1462, 1464 n.4 (11th Cir. 1997). If a petitioner fails to establish either *Strickland* prong, the Court need not consider the other prong in finding that there was no ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 at 689–90. Thus, a

court, when considering an 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; *see also Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

As observed by the Eleventh Circuit Court of Appeals:

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

White v. Singletary, 972 F.2d 1218, 1220–21 (11th Cir. 1992) (citation omitted). Under 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

Murray raises seven grounds in his § 2255 motion. In Grounds One, Four, Five, and Six, Murray generally asserts that his guilty plea was involuntary because defense Counsel Rajan Joshi ("Joshi") failed to adequately investigate his case and coerced him to plead guilty. He also urges in Ground One that, after his guilty plea, sentencing counsel Daniel Broderson ("Broderson") was ineffective because he did not object to the Presentence Investigation Report ("PSR"). In Ground Two, Murray urges that Joshi was constitutionally ineffective for failing to ensure that he receive a mental evaluation before

pleading guilty. In Ground Three, Murray claims that Joshi was constitutionally ineffective for leading him to believe that he would only receive 87-108 months in prison if he pleaded guilty. Finally, in Ground Seven, Murray argues that his sentence was unconstitutionally enhanced. To the extent possible, each claim will be addressed separately.[3]

a. Grounds One, Four, Five, and Six

In these grounds, Murray generally claims that defense counsel Joshi was ineffective for coercing him into pleading guilty and for failing to adequately investigate his case and challenge the government's evidence (Doc. 8 at 10-20, 23-32). He asserts that he only accepted the government's plea offer because Joshi refused to go to trial and refused to review exonerating evidence (*Id.*). He claims that Joshi did not sufficiently investigate his case and find the person who actually committed the crimes (*Id.*). Finally, he asserts that sentencing counsel Brodersen was ineffective for failing to challenge the "severe and Draconian sentence" recommended in the pre-sentencing report (PSR) and imposed by this Court (*Id.* at 19).

A guilty plea must be knowing and voluntary in order to be constitutionally valid. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). A petitioner may challenge the entry of a guilty plea on the basis that counsel's ineffectiveness prevented the plea from being

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[3] Murray filed an 11-page motion, a 46-page supporting memorandum, and a 23-page reply (Doc. 7; Doc. 8; Doc. 22). The claims and arguments raised in these documents are rambling, argumentative, and repetitive—making it necessary for this Court to group his arguments into related subsets so that his allegations can be efficiently addressed. Any of Murray's allegations not specifically addressed herein have been found to be without merit.

knowing and voluntary. *Tollett v. Henderson*, 411 U.S. 258 (1973). A petitioner raising such a claim must show that his counsel's advice was not within the range of competence demanded of attorneys in criminal cases and that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Murray cannot meet this standard. Despite his argument to the contrary, nothing in the record (except for Murray's own self-serving statements and affidavits) supports his claim that Joshi or anyone else coerced his guilty plea.

On May 13, 2015, Murray signed a written plea agreement certifying that he understood its terms (Cr. Doc. 86). In the plea agreement, Murray admitted that he was guilty of the offense to which he was pleading and that the facts set forth in the factual basis were true (*Id.* at ¶ 10). The factual basis stated that Murray portrayed himself online as a minor to a Texas juvenile and that Murray and the Texas juvenile "discussed trading child pornography and traded images of child pornography via email." (*Id.* at 2). The factual basis also alleged that Murray had stored on an iPod touch device at least 250 images and videos of child pornography that he had obtained using the internet and that an additional 1562 files containing pornographic images of young boys were found on Murray's HP Pavilion laptop computer (*Id.* at 3-4).

At his May 15, 2013 plea colloquy, Judge Lammens advised Murray that he had taken an oath to tell the truth, and that if he failed to do so, his testimony could result in a felony prosecution for perjury (Cr. Doc. 94 at 3). Murray affirmed his understanding (*Id.*). Murray also acknowledged that he knew he faced up to twenty years in prison on

count seven of the indictment (*Id.* at 11). Judge Lammens questioned Murray about his written plea agreement:

> Q. Did you read and understand your Plea Agreement?
>
> A. I did.
>
> Q. Did you read each and every page of your Plea Agreement?
>
> A. Yes, Your Honor.
>
> Q. Did you have an opportunity to talk to your attorney about your Plea Agreement?
>
> A. I did.
>
> Q. And was he able to answer all of your questions you may have had about it?
>
> A. Yes.

(Cr. Doc. 94 at 4-5, 24-25). Judge Lammens explained that a guilty plea meant that Murray was waiving his right to trial, his presumption of innocence, and his right to question witnesses, present evidence, and contest the government's evidence against him (*Id.* at 7-8). The colloquy shows that Judge Lammens sought to ensure that Murray's plea was voluntary and free from coercion; that he understood the charges against him; and that he was aware of the consequences of a guilty plea.

Murray admitted to Judge Lammens that he knowingly transported and shipped computer files containing the pornographic images at issue in count seven of the superseding indictment (Cr. Doc. 94 at 23). Judge Lammens questioned Murray about the images:

> Q. Do you admit that you transported and shipped these visual depictions using a means and facility of

interstate commerce, that is, through e-mail by computer via the Internet?

A. Yes, Your Honor.

Q. Do you admit that the production of such visual depictions involved the use of minor children engaging in sexually explicit conduct, including, among other things, genital-to-anal intercourse between two prepubescent minors?

A. Yes, Your Honor.

Q. Do you admit that these visual depictions were of minors engaging in sexually explicit conduct?

A. Yes, Your Honor.

Q. And do you admit that you knew that at least one of the performers in each of the visual depictions was a minor and that you knew that the visual depictions were of such minors engaged in sexually explicit conduct?

A. Yes, Your Honor.

Q. Mr. Murray . . . [the plea agreement] include[s] a factual basis for the offense to which you are pleading guilty.

You said earlier that you read your entire Plea Agreement. Did you read each and every one of those pages of the factual basis?

A. I did, Your Honor.

Q. Do you agree that that's what happened in your case?

A. Yes, Your Honor.

Q. Do you have any objection to the factual basis set forth in your Plea Agreement?

A. No, I do not.

(*Id.* at 24-25). Murray not only agreed with the facts provided in the factual basis, he admitted, under penalty of perjury, his guilt of count seven of the superseding indictment. Thereafter, Judge Lammens inquired:

> Q. Mr. Murray, are you pleading guilty freely and voluntarily and because you believe it is in your best interest to do so?
>
> A. I am, Your Honor.
>
> Q. Has anyone threatened you, forced you, coerced you, or intimidated you in any way regarding your decision to plead guilty?
>
> A. No, Your Honor.
>
> Q. Other than your Plea Agreement, are there any promises or assurances made to you to induce you to plead guilty?
>
> A. No, Your Honor.

(*Id.* at 25-26). Murray had ample opportunity to apprise Judge Lammens of Joshi's alleged coercion and failure to investigate his case. On this record, Murray's subsequent protestations of innocence and claims that he did not want to enter a guilty plea but felt forced to do so, is unworthy of credit.

> [T]he representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Blackledge v. Allison, 431 U.S. 63, 73-74 (1977); *see also United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988) ("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.").

To support his argument that he pleaded guilty only because of Joshi's coercion, Murray attaches to his § 2255 motion two sworn affidavits. Murray signed the first affidavit one day before he signed his plea agreement and three days before his change of plea hearing (Doc. 7-4). He signed the second six days after the United States Probation Office filed the PSR (calculating a 235-240 month sentencing range) with the Court (Doc. 7-5). In each document, Murray asserts that he is not guilty; that his defense attorneys did not believe in his innocence; and that he only pleaded guilty in order to avoid the possibility of a life sentence (*Id.*).[4]

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[4] Murray attached these same affidavits to his motion to withdraw his plea, and this Court determined:

> There is simply no way to reconcile Defendant's inconsistent (sworn) representations; either Defendant lied in his affidavit and verified motion, or he perjured himself in front of the magistrate judge. The Court finds that Defendant's actions appear to be no more than a poorly-camouflaged and calculated attempt to balance Defendant's sentencing risk, or as the United States puts it, to "hedge his bet." Defendant had every opportunity to inform the magistrate judge at the change of plea hearing of the alleged problems associated with his plea and his allegedly nefarious attorney. Yet, instead of telling the magistrate judge the truth, Defendant would now have the Court believe that his then counsel coerced him into pleading guilty. This is utterly belied by the plea colloquy at the hearing. The Court has had the benefit of listening to the audio of the plea hearing and at no point did Defendant hesitate in answering any questions by the magistrate judge, including questions concerning

Even accepting as true Murray's assertion that Joshi persuaded him to plead guilty by insisting that he (Murray) would probably be found guilty and face life in prison if he proceeded to trial, such is not ineffective assistance. It is not coercive to present a criminal defendant with a difficult choice between accepting a plea offer or facing the possibility of more significant consequences without the plea. In fact, this sort of choice is part and parcel of the plea process. As the Supreme Court has stated, "confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, [but] the imposition of these difficult choices [is] an inevitable'–and permissible–'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' " *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)). Murray's assertion that Mark NeJame, the lead attorney for Joshi's law firm, also believed that Murray's best course of action was to plead guilty and "coerced the Petitioner's mother into verbally forcing her son, the Petitioner, to take the plea," by telling her that she was in denial about her son's guilt (Doc. 8 at 15) only supports a conclusion that Joshi's assessment of Murray's case was within the range of competence demanded of attorneys.

> Defendant's satisfaction with his then counsel. This Court gives no evidentiary weight or value to either of Defendant's affidavits, or his verified motion, and instead completely credits the testimony given by Defendant under oath and in front of the magistrate judge.

(Cr. Doc. 101 at 9-10) (internal citations to the record omitted).

Although Murray's lengthy supporting memorandum (Doc. 8) is not a model of clarity, he also appears to argue that Joshi was ineffective because he failed to meaningfully review certain exculpatory information—such as a report from an investigator that other people may have also logged onto the internet as "Tyler Peterson"—before recommending that Murray plead guilty (Doc. 8 at 23-25). Murray also makes an unsupported and speculative assertion that investigating officer Detective Miller "was so convinced that [Murray] was guilty of the crime that he chose to improperly manipulate evidence in order to build a stronger case against him" (*Id.* at 17, 25-29).[5] Murray suggests that Detective Miller either placed pornographic images on Murray's laptop, placed a laptop containing pornographic images in Murray's truck, or misrepresented where he found a laptop computer containing pornographic images (*Id.* at 17-18). Alternatively, Murray suggests that his next-door neighbor—who had access to Murray's wireless internet password—or perhaps another member of the Murray household logged onto the internet as "Tyler Peterson," downloaded the child pornography and placed it on his (Murray's) electronic devices. Murray speculates that Detective Miller may have "tipped off" this teen-aged neighbor when he sought to interview him—allowing the neighbor "several hours to hide or destroy evidence that could have tied [the neighbor] to the crime." (*Id.* at 28). None of this "evidence," which is confusing, ambiguous, and speculative, or Murray's after-the-fact and conclusory

[5] Although Murray calls this "*Brady*" evidence, he does not assert that any evidence was withheld from defense counsel or Petitioner by the prosecution. *See Brady v. Maryland*, 373 U.S. 83 (1963) (holding that suppression by the prosecution of evidence favorable to the defendant who has requested in violates due process).

claim of innocence overcomes his heavy burden of showing that he lied under oath to Judge Lammens at his change of plea hearing when he admitted his guilt. *See* discussion Cr. Doc. 101 at 10-11. Murray is not entitled to relief on his claims that his plea was unknowing and involuntary due to ineffective assistance of counsel.

Equally unavailing is Murray's contention in Ground One that Broderson failed to "object to the unconstitutional enhancements in the pre-sentence report (PSR) upon Petitioner's request to do so." (Doc. 8 at 19). First, Murray does not identify the specific portions of the PSR to which Broderson should have objected. Broderson *did* object to the portions of the PSR that referenced criminal behavior unrelated to count seven of the superseding indictment (Cr. Doc. 19 at 44-46). Specifically, he objected to paragraphs 27, 28, 38, and 40 of the PSR. These paragraphs stated:

> In addition to the Texas juvenile, Murray e-mailed other juvenile males. Murray purported to be a female and sent the juvenile males photos of a female in a bikini or nude, in an attempt to get the juvenile males to send nude images of themselves to him. The ages of the juvenile males ranged between 14 to 16.
>
> Murray is responsible for the transportation of over 1,000 images of child pornography and videos containing child pornography.
>
> The offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, therefore the offense level is increased by 4 levels. USSG § 2G2.2(b)(4).
>
> The offense involved over 1,000 images and videos containing child pornography. Pursuant to USSG § 2G2.2, comment [9n.4(B)(ii)], each video shall be considered to have 75 impages, therefore, the total number of images on the videos is at least 75. The total amount of pornographic images is over 1,075. Since the offense involved 600 or more images, the

> offense level is increased by 5 levels. 18 USSG § 2G2.2(b)(7)(D).

(Cr. Doc. 91 at ¶¶ 27, 28, 38, and 40). Murray, through counsel, denied engaging in the conduct alleged in ¶ 27; claimed that he was unaware of any images showing sadistic or masochistic conduct; and argued that the offense at issue in count seven involved only 81 images (*Id.*); *see also* Sentencing Memorandum, Cr. Doc. 104. At the sentencing hearing, Broderson argued that, since count seven involved only the discrete act of transporting images to the Texas juvenile, only the files that were transported to the Texas juvenile could be used to determine Murray's guidelines score (Cr. Doc. 141 at 3-4). Broderson also argued that none of the 81 images involved in count seven showed sadistic, masochistic, or violent behavior (*Id.* at 5-6). Broderson urged that "the transportation in [count seven] was a discrete act and not part of the same course of conduct" and as a result, the additional images found on Murry's devices should not be used to enhance his sentence (*Id.* at 9). Broderson's performance was not deficient merely because his objections were overruled (*Id.*).

Moreover, Murray's argument that Broderson should have objected to the use of related evidence to enhance his guidelines range under *Alleyne v. United States*, is without merit.[6] District courts are permitted to apply enhancements based solely on judicial factfinding, so long as the sentencing guidelines are advisory. *Alleyne* does not apply to

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[6] *See Alleyne v. United States*, 133 S. Ct. 2151 (2013) (holding that all facts that increase a mandatory minimum sentence must be submitted to and found true by a jury and not merely determined to be true by a sentencing judge).

factual determinations affecting only a defendant's sentencing guidelines range. 133 S. Ct. at 2163 ("In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."). Broderson was not ineffective for failing to make a meritless argument, and Murray was not prejudiced by his failure to do so.

b. Ground Two

Murray asserts that Joshi should have ensured that he receive an evaluation for mental illness prior to his guilty plea (Doc. 8 at 21). Murray does not explain Ground Two other than to state that he was "[a] first offender, who never even received a speeding ticket, and was only nineteen years old at the time of his unconstitutional arrest." (*Id.*).

Murray has not met his burden of showing how Joshi's failure to have him evaluated by a mental health professional amounted to ineffective assistance.[7] Specifically, Murray presents no evidence—other than his own self-serving statements—that a mental health professional would have determined that mental health issues somehow mitigated his crimes or made him incompetent to plead guilty. In short, Murray merely speculates that findings from a mental health professional would have

[7] Moreover, at the plea colloquy, Murray denied suffering from any mental or emotional disease or illness (Cr. Doc. 94 at 5).

been favorable or helpful to his case and would have either led him to reject the guilty plea or resulted in a lesser sentence. Such speculation is "insufficient to carry the burden of a habeas corpus petitioner[.]" *Aldrich v. Wainwright*, 777 F.2d 630, 636 (11th Cir. 1985); *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (vague, conclusory, or unsupported allegations cannot support an ineffective assistance of counsel claim). Ground Two fails to satisfy either *Strickland* prong, and the claim is denied.

c. Ground Three

Murray asserts that Joshi was constitutionally ineffective because he promised that Murray would receive a guidelines level of 29, and a sentence of five to six years in prison if he pleaded guilty; instead, Murray's total offense level was calculated by the United States Probation Office to be 38 with a guidelines imprisonment range of 235-240 months in prison (Cr. Doc. 91 at ¶ 79). The Court sentenced Murray to a below-guidelines sentence of 200 months (Doc. 8 at 22).

In support of Ground Three, Murray attaches a copy of an undated email sent to his mother, presumably from Joshi, which stated that someone named "Casey" had estimated that Murray's guidelines level would be 29 with a guidelines sentencing range of 87-108 months in prison.[8] Joshi cautioned:

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[8] After Murray's guilty plea, the United States Probation Office calculated Murray's offense level to be 38 (Cr. Doc. 91). The USPO included points (not considered by Casey) for behavior that depicted sadistic or masochistic conduct or other depictions of violence; for the use of a computer; and because the offense involved over 1,000 images and videos containing child pornography (*Id.* at ¶¶ 35-40). In addition, although Joshi calculated that Murray would receive a 3-level enhancement based on his possession of between 150 and 300 images, he received a 5-level enhancement for possessing more than 1000 images (Doc. 7-20; Cr. Doc. 91). The factual basis contained in the plea agreement—and to which

> This is my professional estimate, but the actual guidelines will be determined by the probation officer who conducts a pre-sentence investigation and it [is] the Judge's final decision on what the guidelines are. The guidelines are an advisory sentencing range for the Judge.

(Doc. 7-20). Even if Murray actually viewed the email that was sent to his mother prior to entering the plea, the facts in this case do not support his argument that Joshi was constitutionally ineffective.

First, even if Joshi had estimated a lesser sentencing guidelines range prior to sentencing, "[g]enerally, counsel's erroneous predictions or estimates [regarding a prospective sentence] do not rise to the level of deficient performance or render a plea involuntary." *Krecht v. United States*, 846 F.Supp.2d 1268, 1281 (S.D. Fla. 2012); *see also Barker v. United States*, 7 F.3d 629, 633 (7th Cir. 1993) ("Misinformation from a defendant's attorney, such as an incorrect estimate of the offense severity rating, standing alone, does not constitute ineffective assistance of counsel."); *United States v. Sweeney*, 878 F.2d 68, 69, 70 (2nd Cir. 1989) (counsel's "erroneous estimate" of a guidelines sentencing range not ineffective assistance).

Next, Murray cannot demonstrate *Strickland* prejudice. His plea agreement, which he signed, specifically stated that he faced up to 20 years in prison (Cr. Doc. 86 at ¶ 2). During the plea colloquy, Judge Lammens informed Murray that he faced up to twenty years in prison, and also told him that the sentencing guidelines were merely advisory (Cr. Doc. 91 at 11, 13). Judge Lammens cautioned that "the sentence that the district judge

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Murray agreed—calculated that his electronic devices contained more than 1000 pornographic images and videos (Cr. Doc. 86 at 20).

imposes may be different than any estimated sentence that your attorney or anyone else has given you. In fact, your sentence might be higher than what you expect." (*Id.* at 15, 19). Murray acknowledged that he understood everything Judge Lammens said about sentencing (*Id.* at 15). Murray affirmed that no one had promised him anything in order to get him to plead guilty (Cr. Doc. 94 at 26). Because Judge Lammens explained Murray's sentencing exposure, and Murray stated under oath that he understood it, any misunderstanding created by Joshi's misadvice was remedied by the Court. *Stillwell v. United States*, 709 F. App'x 585, 590 (11th Cir. 2017) (holding that Stillwell could not establish prejudice in part "because both the plea agreement and the district court informed him that he could not rely on counsel's estimated sentence").

Ground Three fails to satisfy either *Strickland* prong, and the claim is denied.

d. Ground Seven

In Ground Seven, Murray again asserts that Broderson was ineffective for failing to challenge the enhancements to his sentence (Doc. 8 at 33). He urges that his sentence is "overly draconian and harsh," in violation of the Eighth Amendment, and that § 2G2.2 "is 'fundamentally different; from most other guidelines and is required to be applied with 'great care.' " (*Id.* at 34). According to Murray, Broderson should have argued that: Murray was only seventeen when this crime began;[9] Murray is actually innocent of the

[9] Murray was born on July 14, 1992 (Cr. Doc. 91 at 2). The crimes were alleged to have occurred between February 4, 2011 and April 11, 2013 (Cr. Doc. 141 at 11-12). Therefore, Murray was not seventeen when the charged crimes occurred as he now alleges. To the extent Murray now argues that he (or his neighbor or another family member) was actually trading pornography with a juvenile for a longer period of time than charged by the government, Broderson was not ineffective for failing to alert the government.

crime; Murray's sentence violates *Alleyne*, because "the factual findings supporting the adjustment [were] made by the district court and [were] not made by a jury or admitted by [Murray], thus violating the Fifth and Sixth Amendments"; Murray's guidelines offense level should have been scored only on the images that were involved with the Texas juvenile—which did not contain images of sadism, masochism, or violence; the Texas juvenile at issue in count seven of the superseding indictment "was already engaging in prohibited behavior that showed a pattern of activity involving possession and distribution of child pornography, before ever having contact with [Petitioner] through email"; and no expert testified that the children depicted in the pornographic images found on his electronic devices were actually under the age of twelve and "could just as easily be 13 or 14" (*Id.* at 35-41). Murray is not entitled to relief on Ground Seven.

First, Borderson attacked the advisory guidelines range recommended by the United States Probation Office in Murray's Sentencing Memorandum (Cr. Doc. 104) where he raised most, if not all, of the arguments Murray now faults him for failing to make. As a result, Ground Seven fails to satisfy *Strickland*'s performance prong.[10] Next,

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[10] Although superficially couched in terms of ineffective assistance of counsel, Murray's arguments, both in his § 2255 supporting memorandum and his reply, are not focused on Broderson's performance. Rather, Ground Seven collapses into an attack on the enhancements applied to Murray's guidelines offense level, a complaint that he was sentenced too harshly, and criticism of this Court's July 2, 2015 order denying his motion to withdraw his plea (Doc. 8; Doc. 22). It is clear that Ground Seven is Murray's attempt to evade the appeal waiver he signed as part of his plea agreement. The appeal waiver stated that:

> The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory

as already discussed, Broderson objected at the sentencing hearing to the use of any image for enhancement purposes other then those that were involved with the Texas juvenile. *See* discussion *supra* Part III(a); (Cr. Doc. 141 at 3-6; Cr. Doc. 194). Broderson urged that "it's our contention that the transportation in this case was a discrete act and not part of the same course of conduct and therefore these counts wouldn't be grouped .

> maximum and expressly waives the right to appeal defendant's sentence on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorize by 18 U.S.C. § 3742(b), then the defendant is released from his waiver and may appeal the sentence as authorized by 18 U.S.. § 3742(a).

(Cr. Doc. 86 at 12-13). That Murray now seeks to challenge his sentence (instead of Counsel's ineffectiveness) is underscored by an argument made in his reply in which he urges that the case cited by the government to support the five-point enhancement for possession of over a thousand images of child pornography, *United States v. Cote*, 482 F. App'x 373, 375 (11th Cir. 2011), does not apply to his situation. Murray argues that *Cote* is distinguishable from his case because, in his case (unlike *Cote*), "peer-to-peer file sharing was never used." (Doc. 22 at 8). This is precisely the argument raised by Broderson at sentencing. *See* Cr. Doc. 141 at 9 ("It's our position that the [*Cote*] case is distinguishable from this case primarily because in the [*Cote*] case the defendant utilized a peer-to-peer file share program to transport all the images that the Court counted against him. In this case there's no evidence of the use of a file peer-to-peer file sharing program.").

. . such that the Court should consider them as relevant conduct." (Crim. Doc. 141 at 9).[11] Broderson cannot be faulted for the Court's finding that "the whole course of conduct is relevant conduct under the sentencing guidelines." (Cr. Doc. 141 at 10). Finally, as already noted, *Alleyne* does not apply to factual determinations affecting only a defendant's sentencing guidelines range. *See* discussion *supra* Part III(a).

Murray waived his right to attack his sentence on collateral review, and Broderson cannot be deemed ineffective for failing to make arguments that he did, in fact, make—either in the sentencing memorandum or at the sentencing hearing—or that were barred by Murray's waiver. Murray is not entitled to relief on Ground Seven.

Any of Murray's allegations not specifically addressed herein have been found to be without merit. Because each claim raised in the petition is conclusory, meritless, or affirmatively contradicted in the record, an evidentiary hearing is not required. *See Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989).

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

1. Murray's amended motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. 7) is **DENIED.**

2. The **Clerk of the Court** is directed to terminate any pending motions, enter judgment accordingly, and close this case.

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[11] The prosecutor countered this argument by noting that Murray had sent the Texas juvenile an email saying that he (Murray) had "82 sets" of images and that he was going to send the juvenile "a few at a time." (Doc. 141 at 13-14).