

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

ERIK BILAL KHAN,

Petitioner,

v.

CR No. 12-2901 RB/CG  
CV No. 17-0744 RB

UNITED STATES OF AMERICA,

Respondent.

**FINAL JUDGMENT**

**THE COURT**, having issued an Order adopting the Proposed Findings and Recommended Disposition of Chief United States Magistrate Judge Carmen E. Garza, (CR Doc. 234), enters this Judgment in compliance with Rule 58 of the Federal Rules of Civil Procedure. Petitioner's *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody* (CR Doc. 194), is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**. Additionally, pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts, the Court **DENIES** a certificate of appealability.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
ROBERT C. BRACK  
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**  
District of New Mexico

UNITED STATES OF AMERICA  
V.

**Judgment in a Criminal Case**

**ERIK BILAL KHAN**

(For Offenses Committed On or After November 1, 1987)

**Case Number: 2:12CR02901-001RB**

USM Number: 66770-051

Defense Attorney: **Vincent J. Ward (Retained)**

**THE DEFENDANT:**

- ☒ pleaded guilty to count(s) **S1, S2, S3, and S4 of Indictment**  
☐ pleaded nolo contendere to count(s) which was accepted by the court.  
☐ after a plea of not guilty was found guilty on count(s)

The defendant is adjudicated guilty of these offenses:

<i>Title and Section</i>	<i>Nature of Offense</i>	<i>Offense Ended</i>	<i>Count Number(s)</i>
18 U.S.C. Sec. 2252(a)(2), 2252(b)(1), and 2256	Distribution of Visual Depictions of Minors Engaged in Sexually Explicit Conduct	05/09/2012	S1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count .  
☐ Count dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

**06/27/2016**

Date of Imposition of Judgment

**/s/ Robert C. Brack**

Signature of Judge

**Honorable Robert C. Brack**

**United States District Judge**

Name and Title of Judge

**07/01/2016**

Date Signed

Defendant: **ERIK BILAL KHAN**  
Case Number: **2:12CR02901-001RB**

**ADDITIONAL COUNTS OF CONVICTION**

<i>Title and Section</i>	<i>Nature of Offense</i>	<i>Offense Ended</i>	<i>Count Number(s)</i>
18 U.S.C. Sec. 2252(a)(2), 2252(b)(1), and 2256	Receipt of Visual Depictions of Minors Engaged in Sexually Explicit Conduct	05/09/2012	S2
18 U.S.C. Sec. 2252(a)(4)(B), 2252(b)(2), and 2256	Possession of a Matter Containing Visual Depictions of Minors Engaged in Sexually Explicit Conduct	05/09/2012	S3
18 U.S.C. Sec. 2251(a), 2251(e), and 2256	Attempted Production of a Visual Depiction of a Minor Engaging in Sexually Explicit Conduct	05/01/2010	S4

Defendant: **ERIK BILAL KHAN**  
Case Number: **2:12CR02901-001RB**

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **240\*** months.

**\*A term of 240 months imprisonment is imposed as each of Counts S1 and S2, said terms shall run concurrently; a term of 120 months imprisonment is imposed as to Count S3, which shall run concurrently to the sentence imposed in Counts S1 and S2; and a term of 240 months imprisonment is imposed as to Count S4, which shall run concurrently to the sentence imposed in Counts S1, S2, and S3, for a total term of 240 months.**

☒ The court makes the following recommendations to the Bureau of Prisons:

**service of sentence at Federal Correctional Institution Fort Dix, Joint Base MDL, New Jersey; or a Federal Medical Center closest to the state of New Jersey; or the Federal Correction Center in Allenwood, Pennsylvania.**

**The Court further recommends the defendant participate in the Bureau of Prison's Sex Offender Program.**

- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at on
  - ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on
  - ☐ as notified by the United States Marshal.
  - ☐ as notified by the Probation or Pretrial Services Office.

### RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to  
\_\_\_\_\_ at \_\_\_\_\_ with a Certified copy of this Judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

Defendant: **ERIK BILAL KHAN**  
Case Number: **2:12CR02901-001RB**

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Life**.

**Supervision Release for a term of Life is imposed as to each of Counts S1, S2, S3, and S4, said terms shall run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance.

The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by statute. (Check, if applicable.)
- ☒ The defendant shall register with the state, local, tribal and/or other appropriate sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Criminal Monetary Penalties sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

### STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any local, state, tribal, or federal registration agency in the jurisdiction in which he or she resides, works, or is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence;
- 14) the defendant shall waive his/her right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor the defendant's progress. The probation

- officer shall disclose the presentence report and/or any previous sex offender or mental health evaluations to the treatment provider;
- 15) the defendant shall submit to a search of person, property, house, residence, vehicles, documents, businesses, computers, and other electronic communications or data storage devices or media effects [as defined in 18 U.S.C. 1030(e)(1)], at any time, by a probation officer with reasonable suspicion concerning a violation of a condition of probation or supervised release, or unlawful conduct by the person, in the lawful discharge of the officer's supervision functions. The defendant shall inform any other occupants that the premises may be subject to searches pursuant to the condition. Failure to submit to a search may be grounds for revocation of supervision;
  - 16) the defendant shall not have any direct or indirect contact or communication with the victim or his or her family, or go near or enter the premises where the victim or his or her family resides, is employed, attends school or treatment, except under circumstances approved in advance and in writing by the probation officer.

Defendant: **ERIK BILAL KHAN**  
Case Number: **2:12CR02901-001RB**

### **SPECIAL CONDITIONS OF SUPERVISION**

**The defendant must refrain from the use and possession of alcohol and other forms of intoxicants.**

**The defendant must participate in and successfully complete an outpatient mental health treatment program approved by the probation officer. The defendant may be required to pay a portion of the cost of this treatment as determined by the probation officer.**

**Immediately upon the defendant's commencement of supervision, or as soon as possible thereafter, the defendant must undergo a risk assessment and/or psychosexual evaluation and begin participating in sex offender treatment, consistent with the recommendations of the assessment and/or evaluation. Furthermore, the defendant must submit to clinical polygraph testing and any other specific sex offender testing, as directed by the probation officer. The defendant may be required to pay a portion of the cost of testing or treatment as determined by the probation officer.**

**The defendant must not loiter within 100 feet of school yards, parks, playgrounds, arcades, or other places used primarily by children under the age of 18.**

**The defendant must participate in and successfully complete an outpatient substance abuse treatment program approved by the probation officer, which may include testing. The defendant is prohibited from obstructing or attempting to obstruct or tamper, in any fashion, with the collection, efficiency and accuracy of any substance abuse testing device or procedure. The defendant may be required to pay a portion of the cost of treatment and/or drug testing as determined by the Probation Office.**

**The defendant must submit to substance abuse testing as directed by the probation officer. The defendant is prohibited from obstructing, or attempting to obstruct or tamper, in any fashion, with the collection, efficiency and accuracy of any substance abuse testing device or procedure. The defendant may be required to pay a portion of the cost of testing as determined by the probation officer.**

**The defendant must submit to a search of the defendant's person, property, or automobile under the defendant's control to be conducted in a reasonable manner and at a reasonable time, for the purpose of detecting alcohol, drugs, weapons, child pornography material and/or any other illegal contraband at the direction of the probation officer. The defendant must inform any residents that the premises may be subject to a search.**

**The defendant must not possess or use a computer or other related hardware or software during the period of supervised release/probation without prior approval of the probation officer.**

**The defendant must not possess or use a computer with access to any "on-line computer service" at any location without prior approval of the probation officer. The defendant must allow the probation officer to install appropriate software to monitor the use of the Internet.**



**The defendant shall register with the State, local, tribal and/or other appropriate sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer.**

**The defendant is prohibited from viewing or possessing any material including photographs, images, books, writings, drawings, videos or video games, depicting sexually explicit conduct or child pornography as defined in 18 U.S.C. 2256.**

**With the exception of family, the defendant must not have contact with children under the age of The defendant must immediately report unauthorized contact with children to the probation officer.**

**The defendant must not volunteer for any activities in which the defendant supervises children with mental or physical disabilities.**

**The defendant must comply with the standard conditions of supervision, including the standard sex offender conditions adopted by the District of New Mexico on November 17, 2011.**

Defendant: **ERIK BILAL KHAN**  
Case Number: **2:12CR02901-001RB**

### CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties in accordance with the schedule of payments.

☐ The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:	<b>Assessment</b>	<b>Fine</b>	<b>Restitution</b>
	<b>\$400.00</b>	<b>\$0.00</b>	<b>\$12,000.00</b>

### SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

A ☒ In full immediately; or

B ☐ \$ immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

**Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.**

**A Special Assessment of \$100.00 is imposed as to each of Counts S1, S2, S3, and S4, for a total of \$400.00, is imposed and is due during the defendant's term of incarceration.**

**Based on the defendant's lack of financial resources, the Court will not impose a fine.**

**Pursuant to the Mandatory Restitution for Sexual Exploitation of Children Act and 18 U.S.C. §2259, it is further ordered that the defendant will make restitution in the amount of \$2,000.00, to each victim, for a total of \$12,000.00. Restitution shall be submitted to the Clerk of the Court, Attention Intake, 333 Lomas Boulevard N.W. Suite 270, Albuquerque, New Mexico 87102, to then be forwarded to the victim(s). The restitution will be paid through the Bureau of Prisons Inmate Financial Responsibility Program.**

**Consistent to the stipulation in the Plea Agreement, the defendant forfeits his rights, title, and interest to the items listed in the Plea Agreement.**

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

EXHIBIT B

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

FILED  
United States Court of Appeals  
Tenth Circuit

August 6, 2019

Elisabeth A. Shumaker  
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 18-2099

ERIK BILAL KHAN,

Defendant - Appellant.


ORDER

Before **BRISCOE**, **MORITZ**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 25, 2019

Elisabeth A. Shumaker  
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIK BILAL KHAN,

Defendant - Appellant.

No. 18-2099  
(D.C. Nos. 2:17-CV-00744-RB &  
2:12-CR-02901-RB-1)  
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY\*

Before **BRISCOE**, **MORITZ**, and **EID**, Circuit Judges.

After agreeing to plead guilty to four counts of child pornography in exchange for a 20-year prison sentence, Erik Khan filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. The district court denied his motion. To appeal from that denial, he requires a certificate of appealability (COA). *See United States v. Springer*, 875 F.3d 968, 972 (10th Cir. 2017) (citing 28 U.S.C. § 2253(c)(1)(B)), *cert. denied*, 138 S. Ct. 2002 (2018). The district court denied a COA. Mr. Khan has renewed his application with this court. We now deny a COA and dismiss this proceeding.

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\* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

## BACKGROUND

Mr. Khan initially was charged with one count each of receipt, distribution, and possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(2), (a)(4)(B), (b)(1) and 2256. He faced a statutory sentencing range of 5 to 20 years on the receipt and distribution counts, and a maximum of 10 years on the possession count. *See id.* § 2252(b). Mr. Khan claims that when he was arraigned he told his retained attorney he wanted to plead guilty immediately, but counsel told him he could not plead guilty at the arraignment.

The government later offered Mr. Khan a deal in which he would plead guilty in exchange for a 22-year sentence, but he rejected that offer. After he rejected the plea offer, the grand jury returned a superseding indictment that added a charge of attempted production of child pornography, in violation of 18 U.S.C. § 2251(a). This additional charge carried a mandatory minimum sentence of 15 years and a maximum 30-year sentence.

In November 2013, Mr. Khan pled guilty to all four counts charged in the superseding indictment. As part of their amended plea agreement, Mr. Khan and the government stipulated to a sentence of 20 years' imprisonment, followed by lifetime supervised release. *See Fed. R. Crim. P. 11(c)(1)(C)* (authorizing parties to "agree that a specific sentence or sentencing range is the appropriate disposition of the case"). In the plea agreement, Mr. Khan waived his right to collaterally attack his convictions and sentence "except on the issue of defense counsel's ineffective assistance." *R.*, Vol. 1 at 381 (internal quotation marks omitted).

Mr. Khan thereafter filed his § 2255 motion. Among other claims, he argued that his defense counsel had been ineffective (1) in interfering with his decision to enter an “open” plea (i.e., without an agreement with the government) to the initial three charges he faced at arraignment, and (2) by failing to adequately investigate the basis for filing a motion to suppress the evidence against him. The district court concluded he had failed to show prejudice from counsel’s alleged interference with his decision to plead guilty. It further stated it had already considered and rejected Mr. Khan’s claims for suppression of evidence in its decision denying reconsideration of his motion to suppress. It therefore denied relief on these claims, without conducting an evidentiary hearing on them.

### ANALYSIS

To obtain a COA, Mr. Khan 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 a claim on the merits, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). But when a district court has denied relief on procedural grounds, the petitioner must show that reasonable jurists could debate both (1) the validity of the constitutional claim and (2) the correctness of the district court’s procedural ruling. *Id.*

Mr. Khan seeks a COA on three issues:

1. Was [he] deprived [of] the effective assistance of counsel where counsel interfered with his decision of whether or not to plead guilty at the arraignment?

2. Was [he] deprived [of] the effective assistance of counsel where counsel failed to investigate the law and facts surrounding a motion to suppress?

3. Did the District Court err in failing to hold an evidentiary hearing?

COA Appl. at 4.

### **1. Guilty Plea**

We first consider Mr. Khan's argument that his counsel interfered with his decision to enter an "open" guilty plea at his arraignment. Ordinarily, a petitioner claiming ineffective assistance of counsel "must show both that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense." *Grant v. Royal*, 886 F.3d 874, 903 (10th Cir. 2018) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)) (internal quotation marks omitted), *cert. denied*, 139 S. Ct. 925 (2019). But Mr. Khan argues he was not obliged to show prejudice, because his counsel's alleged error was not merely strategic but interfered with his objective for the representation in his case. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018). Even assuming *McCoy* applies retroactively to this collateral proceeding, Mr. Khan has not made a debatable showing that its holding applies under the facts of his case.

In *McCoy*, a death-penalty case, "the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *Id.* at 1505. Notwithstanding the defendant's insistence on his objective of asserting his innocence, his counsel told the jury during his trial that he was guilty of murdering the victims. *Id.* The Supreme Court reversed the denial of the defendant's new-trial motion,



holding that “it is the defendant’s prerogative, not counsel’s, to decide on the objective of his defense: to admit guilt . . . or to maintain his innocence . . . .” *Id.* The Court further explained that *Strickland*’s prejudice requirement did not apply, because the constitutional violation of the defendant’s right of autonomy “was complete when the [trial] court allowed counsel to usurp control of an issue within [the defendant’s] sole prerogative,” which represented a “structural” error, “not subject to harmless-error review.” *Id.*

In *McCoy*, the defendant’s disagreement with his counsel affected the object of the representation: whether the defendant should concede guilt. No such conflict is alleged here. Mr. Khan chose to plead guilty, his counsel worked toward that objective, and he ultimately pled guilty. The only disagreement alleged between Mr. Khan and his counsel involved the timing of the guilty plea. Mr. Khan fails to show that it is reasonably debatable whether this alleged error was structural under *McCoy* and thus exempt from *Strickland*’s prejudice requirement. *Cf. United States v. Rosemond*, 322 F. Supp. 3d 482, 486 (S.D.N.Y. 2018) (finding no violation of *McCoy* based on counsel’s concession that the defendant directed a shooting, where both the defendant and his counsel maintained his innocence “but disagreed about the best course to attempt to avoid conviction”). We will therefore consider the alleged error using the *Strickland* test, including its prejudice component, not *McCoy*.

The district court determined that Mr. Khan failed to satisfy *Strickland*’s prejudice prong, for two reasons. First, if he had entered an open plea at the arraignment the government would have been free to continue to investigate him and to prosecute him

separately for attempted production of child pornography. Second, even if the government did not separately charge him with attempted production, there was not a substantial likelihood that by pleading guilty at arraignment Mr. Khan would have received a lower sentence than the 20 years he ultimately agreed to.

The first of these rationales justifies denial of a COA. As the district court stated, had Mr. Khan entered into an open plea, without an agreement to forgo additional charges the government could have sought to separately indict him on the production charge. Mr. Khan argues this possibility should be ignored when determining whether he was prejudiced by his counsel's alleged ineffectiveness. He contends prejudice should be determined solely by comparing the charges for which he was originally indicted to the charges to which he ultimately pled guilty. We disagree. The cases Mr. Khan cites concerning prejudice, COA Appl. at 9-10, do not concern counsel's failure to sponsor an open plea and we do not find them persuasive on this issue. In analyzing Mr. Khan's ineffective-assistance claim, it would be improper to turn a blind eye to the fact that without a binding plea agreement the government would have been free to bring additional charges. *Cf., e.g., United States v. Jones*, 832 F. Supp. 2d 519, 529-30 (E.D. Pa. 2011) (counsel was not ineffective in failing to object to additional charges the government brought, where no formal plea agreement had been signed by the time of the superseding indictment).

Mr. Khan also argues that it is *unlikely* the government would have separately indicted him for the attempted production count if he had entered an "open" plea. His

argument rests on speculation.<sup>1</sup> To establish prejudice under *Strickland*, “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112 (2011). “Mere speculation is not sufficient” to satisfy a petitioner’s burden. *Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011).

In the plea agreement, Mr. Khan admitted that the attempted production count—unlike the other counts he had been charged with—involved communication with and solicitation of an individual victim. The alleged likelihood that he would never have been charged with that count had he pled guilty to the other three counts is insufficient to debatably establish prejudice under the *Strickland* test. We therefore deny a COA concerning this claim.

## **2. Motion to Suppress**

Mr. Khan next challenges counsel’s failure to investigate the facts and law surrounding his motion to suppress. In 2013, his counsel filed a motion to suppress all evidence obtained as the result of a search warrant for his home. The district court held an evidentiary hearing on the motion and denied it. Two years later, after Mr. Khan had entered his guilty plea, his new counsel filed a motion seeking reconsideration of the denial of his motion to suppress. The motion to reconsider included an argument that

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<sup>1</sup> Mr. Khan cites what he claims is evidence that the government would have been willing to forgo any further charges if he pled guilty. *See R.*, Vol. I at 240, 334-35. But this evidence, consisting of emails from a prosecutor to Mr. Khan’s counsel, concerns their negotiations surrounding a formal plea agreement. It does not reveal the government’s position concerning an open plea without any plea agreement.

previous counsel had been ineffective in failing to properly investigate the motion to suppress.

The district court denied the motion. Citing *Strickland*, it found that Mr. Khan had failed to show that his previous counsel's handling of the motion to suppress had been deficient or that he had suffered any prejudice. Although the district court noted that ineffective-assistance claims should normally be brought in collateral proceedings, it analyzed the claim under both prongs of *Strickland*, finding neither of them satisfied. Having done so, at the end of its decision it returned to the theme of collateral proceedings, stating that the facts were far from fully developed, there was insufficient evidence to determine the trial strategy of Mr. Khan's counsel, and for this reason the ineffective-assistance claims would be more appropriately considered in collateral proceedings. But when Mr. Khan accepted the district court's invitation and raised the issue in his § 2255 motion, the district court stated that it had already addressed the issue in denying his motion for reconsideration. Mr. Khan argues that the district court erred by refusing to further analyze his ineffective-assistance claim in § 2255 proceedings, after previously stating the claim would be more appropriately addressed through those proceedings.

Although the district court's order denying reconsideration may have been somewhat ambiguous, Mr. Khan fails to show that the district court's later reliance on that order to deny this § 2255 claim is debatable. As the district court stated in its order denying the § 2255 motion:

[I]n considering the motion for reconsideration, the Court considered the merits of the arguments raised in that motion and found that Petitioner's counsel's performance was not deficient and that Petitioner was not prejudiced by counsel's performance relating to the motion to suppress. Specifically, the Court held that the strategies Petitioner's counsel used in pursuing the motion to suppress were within the range of professionally competent assistance, and that even if the Court had found the search warrant to be invalid, the good-faith exception would still have protected the evidence from exclusion.

R., Vol. I at 395 (citation omitted).

Although Mr. Khan makes generalized assertions that the district court's reasoning was erroneous, *see* COA Appl. at 13-14 (decrying "a number of troubling facts" uncovered by his new counsel and old counsel's failure "to investigate the law and facts surrounding the litigation"), and enumerates various arguments made in the motion for reconsideration, *id.* at 12, he fails to develop an adequate argument that the district court's resolution of this claim was debatable. Specifically, he fails to explain why the good-faith exception would not have permitted admission of the evidence, thereby preventing him from showing prejudice under *Strickland* as to this claim. Although we construe his pro se pleadings liberally, we will not serve as his advocate by making his arguments for him. *See Walters v. Wal-Mart Stores, Inc.*, 703 F.3d 1167, 1173 (10th Cir. 2013). He fails to show this issue warrants a COA.

### **3. Evidentiary Hearing**

Mr. Khan also challenges the district court's failure to provide him with an evidentiary hearing. We review the denial of an evidentiary hearing for abuse of discretion. *United States v. Clingman*, 288 F.3d 1183, 1187 n.4 (10th Cir. 2002). A hearing was not required here because "the motion and the files and records of the case

conclusively show that the prisoner is entitled to no relief' on his claims. 28 U.S.C. § 2255(b).

### CONCLUSION

We deny a COA and dismiss this proceeding. We note that Mr. Khan has filed a motion to proceed in forma pauperis (IFP). The district court previously granted him IFP to proceed on appeal. But in its order, the district court referenced and applied provisions of the Prison Litigation Reform Act, which does not apply to § 2255 actions. *See McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997). We therefore modify the district court's order to simply grant IFP.

Entered for the Court

Allison H. Eid  
Circuit Judge