FILED
United States Court of Appeals
Tenth Circuit

January 29, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIS J. YAZZIE,

Defendant - Appellant.

No. 19-2172
(D.C. Nos. 1:18-CV-00206-JB-GBW &
1:10-CR-01761-JB-GBW-1)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE**, **HARTZ**, and **PHILLIPS**, Circuit Judges.

Willis Yazzie, proceeding pro se, seeks a certificate of appealability (COA) to appeal from the district court's order dismissing for lack of jurisdiction his motion for relief under 28 U.S.C. § 2255. We deny a COA and dismiss this matter.

Yazzie pleaded guilty to and was convicted of aggravated sexual abuse. After we granted the government's motion to enforce the appeal waiver in his plea agreement and dismissed his appeal, *United States v. Yazzie*, 572 F. App'x 663, 664 (10th Cir. 2014), he filed his first § 2255 motion, claiming counsel was ineffective for failing to seek suppression of his incriminating statements. The district court denied the motion on the

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

merits and we denied a COA. *United States v. Yazzie*, 633 F. App'x 703, 704 (10th Cir. 2016). Soon thereafter, Yazzie filed a request for authorization to file a second § 2255 motion on similar grounds, which we denied.

Yazzie filed the motion at issue here in 2018, raising the same ineffective assistance of counsel arguments he raised in his first motion. Because he filed this successive § 2255 motion without authorization from this court, the district court dismissed it for lack of jurisdiction. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) ("A district court does not have jurisdiction to address the merits of a second or successive § 2255 . . . claim until this court has granted the required authorization."); *see also* 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application . . . is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."); *id.* § 2255(h). In a separate order, the district court also denied a COA.

To appeal the district court's dismissal of his motion, Yazzie must obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(B); *United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008). We liberally construe his pro se opening brief and application for a COA. *See Hall v. Scott*, 292 F.3d 1264, 1266 (10th Cir. 2002). To obtain a COA where, as here, a district court has dismissed a filing on procedural grounds, the movant must show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We need not address the constitutional question if we

conclude that reasonable jurists would not debate the district court's resolution of the procedural one. *Id.* at 485.

In his application for a COA, Yazzie does not dispute that he previously filed a § 2255 motion and that he did not obtain authorization from this court to file another one. He contends, however, that he is entitled to re-file his original motion because the district court did not adequately address the merits of his claims when it denied that motion. As support, he cites *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-44 (1998), in which the Supreme Court held that a claim dismissed as premature in a first habeas petition did not need authorization to be filed in a later habeas petition. But Yazzie does not have a claim that was previously dismissed as premature that is now ripe for adjudication, as was the case in *Stewart*. And, despite his contention that the district court did not adequately consider his claims in denying his first motion, his disagreement with that ruling does not entitle him to relitigate the same claims in another § 2255 motion. Yazzie has not explained how the district court erred in its procedural ruling dismissing his most recent motion for lack of jurisdiction. Because he has not shown that jurists of reasons would debate whether the district court's procedural ruling was correct, we deny a COA.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

January 29, 2020

Mr. Willis Yazzie
FCI - Big Spring
1900 Simler Avenue
Big Spring, TX 79720
#54228-051

RE: 19-2172, United States v. Yazzie
Dist/Ag docket: 1:18-CV-00206-JB-GBW & 1:10-CR-01761-JB-GBW-1

Dear Appellant:

Enclosed is a copy the court's final order issued today in this matter.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of the Court

cc: Thomas John Aliberti

CMW/at

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

No. CR 10-1761 JB
No. CIV 18-0206 JB\GBW

WILLIS J. YAZZIE,

Defendant/Movant.

ORDER DENYING A CERTIFICATE OF APPEALABILITY

THIS MATTER comes before the Court on: (i) the Defendant/Movant's Motion for a Certificate of Appealability (COA) Pursuant to 28 U.S.C. § 2255, filed February 7, 2019 (CR Doc. 241)("Motion for COA"); and (ii) the Defendant/Movant's Motion to Compel the Court to Answer the Motion for COA, filed August 15, 2019 (CR Doc. 244). The Court grants the Motion to Compel, denies the Motion for COA, and denies a Certificate of Appealability.

The Court entered a Memorandum Opinion and Order, filed January 23, 2019 (CR Doc. 239)("MOO"), dismissing Movant Willis J. Yazzie's 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence, as an unauthorized second or successive § 2255 motion. The Court dismissed without prejudice the § 2255 Motion for lack of jurisdiction pursuant to 28 U.S.C. § 2244(b)(3)(A). See Final Judgment, filed January 23, 2019 (CR Doc. 240).

Section 2255 provides that a Court of Appeals panel must certify a second or successive motion in accordance with § 2244 to contain: (i) newly discovered evidence that would be sufficient to establish by clear-and-convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (ii) a new rule of constitutional law that was previously

unavailable, and which the Supreme Court of the United States of America made retroactive to cases on collateral review. See 28 U.S.C. § 2255(h). Section 2244 requires that, before a movant files a second or successive application in the district court, the applicant shall move the appropriate Court of Appeals for an order authorizing the district court to consider the application. See 28 U.S.C. § 2244(b)(3)(A). Until a movant receives the required authorization from the Court of Appeals for the Tenth Circuit, the Court is without jurisdiction to entertain the motion and it must be dismissed. See Burton v. Stewart, 549 U.S. 147, 153 (2007)(per curiam). See also United States v. Springer, 875 F.3d 968, 972-73 (10th Cir. 2017). The Court dismissed Yazzie's § 2255 motion because he failed to meet § 2244(b)(3)(A)'s requirements. See MOO at 4.

By statute, an appeal may not be taken to the Court of Appeals from a final order in a proceeding under § 2255 unless a Circuit Justice or Judge issues a certificate of appealability. See 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

Yazzie's Motion for a Certificate of Appealability contends that he has demonstrated denial of a constitutional right. See Motion for COA at 3. Yazzie directs his arguments, however, to the denial of his first 2255 proceeding. See Memorandum Opinion and Order Adopting the Magistrate Judge's Proposed Findings and Recommended Disposition at 9, filed October 31, 2015 (CR Doc. 215). Yazzie's arguments do not address the Court's dismissal of his second § 2255 motion. The Court determines, under rule 11(a) of the Rules Governing Section 2255 Cases, that Yazzie has not made a substantial showing that he has been denied a constitutional right. The Court will deny a certificate of appealability.

IT IS ORDERED that: (i) the Defendant/Movant's Motion to Compel the Court to

Answer the Motion for COA filed by Movant Willis Yazzie is granted; (ii) the Defendant/Movant's Motion for a Certificate of Appealability (COA) Pursuant to 28 U.S.C. § 2255 is denied; and (iii) a Certificate of Appealability is denied.

UNITED STATES DISTRICT JUDGE

Parties and Counsel

John C. Anderson
United States Attorney
Kyle T. Nayback
Jennifer M. Rozzoni
Glynette R. Carson-McNabb
Thomas Aliberti
Jacob Alan Wishard
Assistant United States Attorneys
United States Attorney's Office
Albuquerque, New Mexico

Attorneys for Plaintiff/Respondent

Willis J. Yazzie, Sr.
Federal Correctional Institution
Big Spring, Texas

Defendant/Movant pro se

APPENDIX A
Opening Brief for COA with A to V Appendices

APPENDICES

Appendix: A CR Doc. 201 Initial § 2255

B CR Doc. 211 AUSA'S Response to petitioner's § 2255

C CR Doc. 214 Proposed Findings and Recommendation

D CV Doc. 22 August 3, 2015 Affidavit

E CR Doc. 215 Memorandum Opinion and Order

F CR Doc. 223 Court of Appeals Denying COA

G Writ of Certiorari is denied May 16, 2016

H Second or Successive denied April 13, 2017, by Court of Appeals

I May not review certiorari for Second or Successive by Supreme Court May 24, 2017

J CR Doc. 231 Refiled § 2255

K CR Doc. 232 Refiled § 2255 Memorandum

L CR Doc. 239 Memorandum Opinion and Order

M CR Do. 240 Judgment by district court

N CR Doc. 241 Motion for COA

O CR Doc. 242 AUSA'S Response to COA

P CR Doc. 243 Petitioner's Response to AUSA

Q CR Doc. 244 Motion to Compel

R Writ of Mandamus

S CR Doc. 245 District Court Denying COA

T CR Doc. 246 Notice of Appeal

U CR Doc. 249 Motion to appeal In Forma Pauperis

V CR Doc. 250 Granting Motion to appeal In Forma Pauperis

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

19-2172

Willis John YAZZIE SR.-Petitioner,
Appellant,

v.

UNITED STATES of America-Respondent,
Appellee.

APPELLANT'S COMBINED OPENING BRIEF AND APPLICATION FOR A CERTIFICATE OF APPEALABILITY (COA)

RELIEF SOUGHT

Petitioner moves this court, pursuant to 28 U.S.C. § 2255 for an order setting aside the judgment entered in this action on May 8, 2014.

GROUNDS FOR RELIEF

Extraordinary circumstances in this case require that the judgment entered in this action be set aside, and no other grounds under § 2255 and no other procedure is available to grant this relief that justice requires. In particular, as more fully shown in petitioner's arguments that his 4th, 5th, and 6th Amendments were violated.

To have my COA granted by this court.

STATEMENT OF THE CASE

Petitioner had filed his Initial § 2255 Motion on October 3rd, 2014 (CR Doc. 195 or Appendix as 1:14-cv-00894-JB-CG and an Order was issued to Cure Deficiency of petitioner's § 2255 Motion by Magistrate Judge Carmen E. Garza. Petitioner then resubmitted his § 2255 Motion on February 2nd, 2015 (CR Doc. 201 or Appendix A).

Response in Opposition by Assistant United States Attorney (AUSA) Jacob Wishard, to petitioner's § 2255 Motion the was filed on May 29th, 2015 (CR Doc. 211 or Appendix B). On July 2nd, 2015 petitioner's response was constructed as a letter (CR Doc. 212 or Appendix) and a Proposed Findings and Recommended Disposition by Magistrate Judge Carmen E. Garza on JUly 22nd, 2015 (CR Doc. 214 or Appendix C).

Memorandum Opinion and Order adopting Report and Recommendations by District Judge James O. Browning, on October 31st, 2015 (CR Doc. 215 or Appendix E).

This court then denied petitioner's COA, on February 4th, 2016 (CR Doc. 223 or Appendix F), and the Supreme Court of the United States (SCUS) denied Writ of Certiorari on May 16th, 2016 (Appendix G).

Petitioner then sought a Second or Successive § 2255 Motion in this court and was denied by this court on April 13th, 2017, (Appendix H) and the SCUS denied Writ of Certiorari on May 16th, 2016 (Appendix I).

Petitioner then refiled his § 2255 Motion pursuant to **Stewart v. Martinez-Villareal**, 523 U.S. 637, 643-45, on March 1st, 2018 (CR Doc. 231 or Appendix J) and Memorandum Opinion and Order of Dismissal was enter on January 23rd, 2019, as denied by District Judge James O. Browning with the Judgment (CR Doc. 240 or Appendix M). Petitioner then sought a Motion for COA pursuant to 28 U.S.C. § 2253(c) on February 7th, 2019 (CR Doc. 241 or Appendix N) and the AUSA filed a Opposition to Petitiner's COA on February 13th, 2019 (CR Doc.

242 or Appendix O) and petitioner respond to the AUSA Thomas J. Aliberti on February 26th, 2019 (CR Doc. 243).

On August 15th, 2019 petitioner filed a Motion to Compel the district court to answer COA (CR Doc. 244 or Appendix Q).

On September 26, 2019 petitioner filed a Writ of Mandamus with this court. (Appendix R).

On October 3rd, 2019 the district court entered an Order Denying the COA. (CR Doc. 245 or Appendix S). And petitioner filed a Notice of Appeal on October 15th, 2019 (CR Doc. 246or Appendix T).

On October 28th, 2019, petitioner filed a Motion to Leave to Appeal (In Forma Pauperis) (CR Doc. 249 or Appendix U) and the U.S. Magistrate Judge Gregory B. Wormuth, granted the motion as not frivolous issues on appeal. (CR Doc. 250 or Appendix V).

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

I filed my Initial § 2255 Motion on February 10th, 2015, claiming Ineffective Assistance of Counsel (IAC) of Attorney James C. Loonam, aka Jim Loonam. I told the court that my attorney was ineffective at the time he had me enter the plea agreement for 15 to 19 years. My attorney was ineffective because he did not suppress my statement the I made to SA Dustin Grant on May 10th, 2010, when I had asked him to do so, but he told me that I waived my rights under Miranda and that was why he could not ask the court to suppress my statement that I made. I conclusively demonstrated to the district court that my 4th and 6th Amendments were violated because I was appointed an incompetent attorney, in my defense, where the attorney had no knowledge to suppress a statement under the 4th Amendment. I told the district court that because of my incompetent attorney it cause prejudice to my conviction. (CR Doc. 201 or Appendix A)

This is what the court said about my X Attorney James Loonam: "James Loonam, considered suppression issues and found no meritorious basis to make such a claim as discussed at two hearings to determine counsel. ...Mr. Loonam considered the issue (and others) and chose not to file a motion because in his professional judgment no meritorious suppression issue existed." (CV Doc. 23 or Appendix E).

And the AUSA said I did not demonstrate IAC performance and prejudice.

On July 22, 2015, the magistrate judge said: "The record establishes that Mr. Loonam and another attorney in his office considered the suppression issues in [p]etitioner's case, and they both agreed that it was not in [p]etitioner's best interest to challenge those issues. ...As a result, this [c]ourt finds that [p]etitioner has failed to satisfy the first prong of the **Strickland** stander." (CV Doc. 21 or Appendix C).

And the magistrate judge also said: "petitioner did not allege that he would have insisted on proceeding to trial",(CV Doc. 21 p.11 or Appendix). and for that reason the court said petitioner fails to meet the second prong of **Strickland.** And for those reasons the magistrate judge recommended to denied my § 2255.

I then responded back with an Affidavit demonstrating that my attorney was ineffective. (CV Doc. 22 or Appendix D).

On October 31, 2015, the district judge adopted the magistrate judge's PFRD and denied my § 2255 Motion (CR Doc. 215 or Appendix E).

On February 4th, 2016 this court denied my COA.

On March 1, 2019, petitioner refiled his § 2255 Motion pursuant to **Stewart v. Martinez-Villareal,** 523 U.S. 637(1998). (CR Doc. 231 and 232 or Apendix J and K).

On January 23, 2019, the district court dismissed the § 2255 Motion without prejudice in a Memorandum Opinion and Order of Dismissal. (CR Doc. 239 or Appendix L). And a Judgment. (CR Doc. 240 or Appendix M).

On February 7, 2019, petitioner filed a Motion for COA. (CR Doc. 241 or Appendix N).

On February 13, 2019, AUSA filed a Opposition to Petitioner Successive Motion for a COA. The AUSA request that the district court dismiss petitioner's motion for COA. (CR Doc. 242 or Appendix O).

On February 26, 2019, petitioner responded back to the AUSA for the COA. (CR Doc. 243 or Appendix P).

On August 15, 2019, petitioner filed a Motion to Compel the Court to Answer the Motion for COA. (CR Doc. 244 or Appendix Q).

In September of 2019, petitioner filed a Writ of Mandamus with this court (Court of Appeals for the Tenth Circuit), to have the district court answer his Motion For COA. (Appendix R).

On October 3, 2019, the district court answer the COA by denying it as unauthorized second or successive § 2255 motion. (CR Doc. 245 or Appendix S).

On October 15, 2019, petitioner filed a Notice of Appeal in the district court. (CR Doc. 246 or Appendix T).

Now petitioner will demonstrate that he was denied his Constitutional Right of the 4th, 5th, and Sixth Amendments, and that a reasonable jurists could debate that the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.

ARGUMENT

I petitioner filed my initial § 2255 Motion on October 3, 2014 (Appendix A) and was denied on October 31, 2015 (Appendix E) as failing to demonstrate IAC. In this initial § 2255 I presented **Dunaway v.New York**, 442 U.S. 200(1979), claiming that my statement could had been suppress, but for the IAC, I was denied my Constitutional Rights of: 4th, 5th, and 6th Amendments Constitutions.

Petitioner then refiled a § 2255 Motion pursuant to **Stewart v. Martinez-Villareal**, 523 U.S. 637(1998), claiming that I was not denied on the merits for my initial § 2255, by claiming the same arguments as the initial § 2255 (Appendix J and K). On January 23, 2019 (Appendix L), the district court

denied the refiled § 2255 as a second or successive § 2255. And on October 3, 2019 (Appendix S) the district court denied the COA and not making a substantial showing that he was denied a Constitutional Right.

Petitioner is going to demonstrate to this court that he was denied his Constitutional Right and that it was debatable that a jurists of reason would have found it debatable that petitioner's argument was correct that he can refile his § 2255 Motion on the grounds that he was denied his constitutional Rights of the 4th, 5th, and 6th, Amendments.

In **Tharpe v. Sellers**, 583 U.S. , 138 S.Ct. , 199 L.Ed.2d 424(2018), the district court denied **Tharpe's** claim as procedurally defaulted in State court and failed to produce any clear and convincing evidence contradicting the State court's determination that Gattie's presence on the jury did not prejudice him. And the Eleventh Circuit denied his COA, that the district court's procedural ruling was correct.

Tharpe produced a sworn affidavit, signed by Gattie about two types on black people, that would permit jurists of reason to dispute whether **Tharpe** demonstrated prejudice. the Supreme court remanded to consider if **Tharpe** is entitled to COA.

In petitioner's case, petitioner produced **Stewart v. Martinez-Villareal** to prove that he can refile his § 2255 Motion, on the grounds that he was not denied on the merits on his initial § 2255 Motion, see Appendix J and K.

When you read **Tharpe v. Ford**, 203 L.Ed.2d 600(2019), latest case, the Supreme Court said: "To this day, **Tharpe's** racial-bias claim has never been adjudicated on its merits."

Also the Eleventh Circuit said **Tharpe** failed to raise the juror-bias claim in a motion for new trial or in his direct appeal and could not go forward with a later decided case.

Now when you read petitioner's Appendix K, it shows that petitioner was

not denied on the merits, the same as **Tharpe's** argument. Petitioner was denied on his initial § 2255 Motion for not demonstrating IAC, and that is not on the merit.

A jurists of reason would find it debatable that the district court's procedural ruling was wrong, where the district court said the petitioner's § 2255 Motion is a second or successive § 2255. Petitioner was denied his Constitutional Right to Due Process of Law, where petitioner was deprived of life, liberty or property.

Petitioner was denied Due Process, when the district court denied his on the grounds that his § 2255 was a second or successive § 2255. If the district court had petitioner pass the hurdle to refile his § 2255, petitioner would have proven that he is innocent of 18 U.S.C. § 2241, see Appendix K.

Petitioner is entitled to a COA, for his § 2255 that a jurists of reason would find it debatable that the district court's procedural ruling was wrong that petitioner's § 2255 was a second or successive § 2255. Unless this court orders otherwise upon review that petitioner was denied on the merit in his initial § 2255 Motion.

All petitioner wants for his COA is that he was not denied on the merit in his initial § 2255 Motion and for that reason he is entitled to have his refiled § 2255 as not second or successive § 2255.

CONCLUSION

Petitioner would like to have this court grant him the COA, to have him refile his § 2255 Motion pursuant to **Stewart v. Martines-Villareal**, 523 U.S. 637(1998).

Respectfully Submitted on December , 2019
/S/
Willis John Yazzie Sr. 54228051 Pro-Se

CERTIFICATE OF SERVICE

I, petitioner certify that a true and correct copy of: "Appellant's Combined Opening Brief and Application for a Certificate of Appealability (COA)", without the supporting Appendixes, did delivered to Assistant United States Attorney Thomas J. Aliberti in this matter at: P.O. Box 607, Albuquerque, NM 87103, on December , 2019.

I declare under penalty of perjury that all of the statements made in this "Certificate of Service" are true and correct and that if called to testify as a witness in this matter, I could and would competently testify to each of the facts set forth in the Certificate.

This Certificate was executed on December , 2019, at Federal Correctional Institution, 1900 Simler Avenue, Big Spring, Texas 79720.

/S/
Willis John Yazzie Sr. 54228051 Pro-Se

FILL OUT AND SIGN EACH OF THE FOLLOWING TWO SECTIONS

I affirm under the penalty for perjury that I placed this Appellant's Combined Opening Brief and Application for a Certificate of Appealability with first-class postage prepaid in the prison mail system or, if I was not incarcerated, in the United States Mail, addressed to the Clerk of the U.S. Court of Appeals for the Tenth Circuit, 1823 Stout St., Denver, CO 80257. In addition, I hereby certify that a copy of this form was placed with first-class postage prepaid in the prison mail system or, if I was not incarcerated, in the United States Mail, addressed to:

Assistant United States Attorney
Thomas J. Aliberti
P.O. Box 607
Albuquerque, New Mexico 87103

(identify the name and address of the opposing governmental attorney)

on the following date:

December , 2019 _____ _____
month day year signature

I certify that the total number of pages I am submitting as my Appellant's Combined Opening Brief and Application for a Certificate of Appealability is 30 pages or less or alternatively, if the total number of pages exceeds 30, I certify that I have counted the number of words and the total is _____, which is less than 13,000. I understand that if my Appellant's Combined Opening Brief and Application for a Certificate of Appealability exceeds 13,000 words, my brief may be stricken and the appeal dismissed.

December , 2019 _____ _____
month day year signature

APPENDIX A

FILED

AO 243 (Rev. 12/04)

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT

FEB 10 2015

SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court MATTHEW J. DYKMAN CLERK District New Mexico	14cv 894 JB/CG
Name (under which you were convicted): YAZZIE, Willis	Docket or Case No.: 1:10-CR-01761-JB
Place of Confinement: F.C.I., 1900, Simler Ave; Big Spring, TX 79720	Prisoner No.: 54228051
UNITED STATES OF AMERICA V.	Movant (include name under which convicted) YAZZIE, Willis

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
United States District Court for District of New Mexico
Suite 270, 333 Lomas Blvd. N.W., Albuquerque, NM 87102

(b) Criminal docket or case number (if you know): No. 10-1761 JB

2. (a) Date of the judgment of conviction (if you know):
(b) Date of sentencing: 3-21-14

3. Length of sentence: 188 months

4. Nature of crime (all counts):
18USC 1153, 2241(c) and 2246 (2)(C)
18USC 1153, 2241(c) and 2246 (2)(D)

5. (a) What was your plea? (Check one)
(1) Not guilty ☐ (2) Guilty ☑ (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to?
Plead guilty to 18USC 1153, 2241(a) and 2246 (2)(C)
Not guilty to 18USC 1153, 2241(c) and 2246(2)(D)

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒

8. Did you appeal from the judgment of conviction? Yes ☑ No ☐

9. If you did appeal, answer the following:

(a) Name of court: U.S. Court of Appeals Tenth Cir. 1823 Stout Street, Denver, Colorado 80257

(b) Docket or case number (if you know): 14-2043

(c) Result: Grant the government's motion to enforce the appeal waiver and dismiss the appeal

(d) Date of result (if you know): 7-23-14

(e) Citation to the case (if you know):

(f) Grounds raised: Appeal the district court's denial of my motion to withdraw my guilty plea. Enforcing the waiver would result in a miscarriage of justice.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If "Yes," answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket of case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Jim Loonam was ineffective in connection with appellate waiver in the plea agreement

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Jim Loonam had no knowledge in Fourth amendement crimnal procedure to suppress my statement that was obtained through the violation of the Fourth amendment. See Dunaway v. New York, 442 US 200 I ask Jim to suppress my statement couse I was compel to confess wrongfully. Jim told me that I cannot suppress my statement couse I waived my right under Miranda warnings. I also sent a motion to the court before the plea to suppress my statement. The advice from Jim was legally incorrect. For counsel failure to suppress my statement following an illegal seizure from Shiprock Trible Jail on May 10, 2010 rendered incompetent assistance of counsel. For counsel incorrect advice to not suppress my statement induced me to plea guilty to a harsh offense when other wise I could of plead ~~guilty~~ guilty to a lesser offense if my statement was suppress. My medical record was also illegally ~~seizure~~ seized without my consent. For incompetent assistance of counsel couse prejudice to my conviction. I would of got lesser sentence if my statement was suppress. See attachment.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Appellant counsel told me that I don't need to. Appellant counsel was Todd B. Hotchkiss

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise issue: _____

GROUND TWO: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

_____

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise issue: _____

GROUND THREE: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise issue: _____

_____

_____

_____

_____

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

_____

_____

_____

_____

_____

_____

_____

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the you are challenging:

(a) At the preliminary hearing: Jim Loonam Albuquerque, N.M.

(b) At the arraignment and plea: Jim Loonam Albuquerque, NM

(c) At the trial:

(d) At sentencing: Kimberly Middlebrooks Albuquerque, NM

(e) On appeal: Todd B. Hotchkiss Albuquerque, NM

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☒ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: For incompetent counsel lacking knowledge to defend me with the Fourth amendement violation. Rendered my plea not knowingly or volantarily enter. I would like the court to grant me to withdraw my guilty plea. See U.S. v. STREATER, 70 F.3d 1314 or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on Feb. 5, 2015 (month, date, year).

Executed (signed) on Willis J Yazzie Sr (date)

Willis J Yazzie Sr
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

IN FORMA PAUPERIS DECLARATION

[Insert appropriate court]

* * * * *

E. Statements Obtained through Violation of Fourth Amendment Rights

Statements obtained following an illegal arrest are inadmissible, unless the prosecution meets its burden of establishing that they were not obtained by exploitation of the illegality – that is, that they are "sufficiently an act of free will to purge the primary taint." Wong Sun v. United States, 371 U.S. 471, 486 (1963). Compare Patton v. United States, 633 A.2d 800, 817 (D.C. 1993) ("the actions of the detectives at the homicide office, and especially the repeated reminder that appellant was not under arrest and that he was free to leave . . . constitute sufficient attenuation" (internal citations omitted)), with Keeter v. United States, 635 A.2d 903 (D.C. 1993) (no attenuation where less than two hours separated the defendant's first statement from illegal arrest and no significant intervening event). Brown v. Illinois, 422 U.S. 590 (1975), held that Miranda warnings alone could not attenuate the taint of an unconstitutional arrest. Brown was illegally arrested, taken to the station, informed of his Miranda rights, and made an inculpatory statement two hours after arrest.

> The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant.

Id. at 603-04 (citation and footnote omitted). The Court held that a statement obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the arrest and the statement. Id. at 603-05. Because there were no significant intervening events, Brown's statements should have been suppressed.

In Dunaway v. New York, 442 U.S. 200, 203 (1979), the defendant was unlawfully arrested, transported to the police station, and questioned after Miranda warnings. The defendant made statements at that time, and the next day made statements and drew sketches of the crime scene. Applying Brown, the Court suppressed all the statements and the sketches as tainted by the unlawful arrest:

> No intervening events broke the connection between petitioner's illegal detention and his confession. To admit petitioner's confession in such a case would allow "law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth."

Id. at 219 (footnote omitted). Similarly, *Taylor v. Alabama*, 457 U.S. 687 (1982), suppressed statements made six hours after the unlawful arrest, where *Miranda* warnings were given, an arrest warrant had issued during the detention, and the defendant was permitted to consult a friend before making the statements. *Accord United States v. Gayden*, 492 A.2d 868 (D.C. 1985); *United States v. Allen*, 436 A.2d 1303, 1309 (D.C. 1981); *see also Martin v. United States*, 567 A.2d 896, 906 (D.C. 1989); *Ruffin v. United States*, 524 A.2d 685 (D.C. 1987). *But see Rawlings v. Kentucky, 448 U.S. 98, 107-10 (1980).*

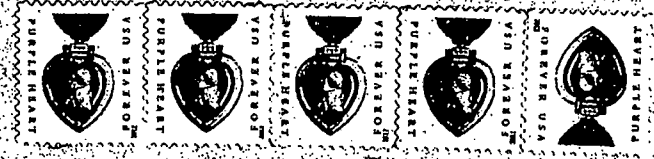
The "intervening event" that will ordinarily break the causal link between an illegal arrest and a subsequent statement is an actual break in custody. For example, in Wong Sun the defendant was released following his illegal arrest on his own recognizance at arraignment. He returned to the police station several days later and made a statement. The Court held that "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" 371 U.S. at 491. And in Wilkerson v. United States, 432 A.2d 730 (D.C. 1981), the police illegally stopped Wilkerson and seized several articles from his shopping cart. Eight days later, Wilkerson came to the police station to reclaim

the articles. During the interim, the articles were reported stolen. The police therefore arrested Wilkerson when he arrived at the police station. His subsequent statements were held admissible because he was out of custody for the eight days between the stop and his statements and because he voluntarily came to the police station. See also United States v. Davis, 617 F.2d 677 (D.C. Cir. 1979) (grand jury testimony of defendant free on personal bond was not fruit of illegal arrest); United States v. Weisman, 624 F.2d 1118, 1126 (2d Cir. 1980) (though defendant "was never entirely free of the shadow of the illegal arrest," coercive impact dissipated as defendant was released on his own recognizance). But see Rawlings, 448 U.S. 98.

Similarly, a statement may be excluded if it was made in response to being confronted with illegally obtained evidence or with police knowledge of such evidence. See Fahy v. Connecticut, 375 U.S. 85, 90-91 (1963); United States ex rel. Hardy v. Brierley, 326 F. Supp. 364, 368 (E.D. Pa. 1971), aff'd, 458 F.2d 38 (3d Cir. 1972).

Finally, New York v. Harris, 495 U.S. 14 (1990), announced a narrow exception to application of the fruits doctrine. The defendant was arrested in his home without a warrant but with probable cause, and contended that his subsequent statement should be suppressed as a fruit of that illegal arrest. In a 5-4 decision, the Court rejected this claim "because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else." Id. at 20. The need to deter warrantless entries into residences was, the Court concluded, sufficiently served by exclusion of any tangible evidence seized in the home during the arrest. However, the Court limited its holding to cases where the police have probable cause to arrest, and explicitly reaffirmed the validity of Brown v. Illinois, 422 U.S. 590 (1975), Dunaway v. New York, 442 U.S. 200 (1979), and Taylor v. Alabama, 457 U.S. 687 (1982).

⇔54228-051⇔
Willis J Yazzie Sr.
Fed.Correctional Institut
1900, Simler AVE
BIG Spring, TX 79720
United States



⇔54228-051⇔
Court Clerk
333 Lomas BLVD NW
Albuquerque, NM 87102
United States

RECEIVED
At Albuquerque NM
FEB 10 2015
MATTHEW J. DYKMAN
CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIS YAZZIE, Defendant.	)	Civil No. 14-0894 JB/CEG Criminal No. 10-1761-JB

UNITED STATES' RESPONSE TO A MOTION PURSUANT TO 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT A SENTENCE BY A PERSON IN FEDERAL CUSTODY

Pursuant to 28 U.S.C. § 2255, and this Court's Order, the United States submits this response to Willis Yazzie's (Yazzie) motion under 28 U.S.C. 2255 to vacate, set aside or correct sentence by a person in federal custody filed October 3, 2014. The United States opposes Yazzie's motion. As demonstrated below, Yazzie's motion should be denied without a hearing.

On June 10, 2010, a grand jury in the District of New Mexico returned a two-count indictment against Yazzie. CR Doc. 12. Count 1 accused Yazzie of Aggravated Sexual Abuse in violation of 18 U.S.C. §§ 1153, 2241(c) and 2246(2)(C). Id. Count 2 accused Yazzie of Aggravated Sexual Abuse in violation of 18 U.S.C. §§ 1153, 2241(c) and 2246(2)(D).

Yazzie filed a motion for a new attorney on November 12, 2010 stating that his attorney would not submit a motion to suppress. CR Doc. 25. He filed a second motion for a new attorney on November 15, 2010 stating that he can no longer work with his attorney due to his lack of trust. CR Doc. 26. On December 17, 2010, the district court denied the motions in a memorandum opinion and order. CR Doc. 30.

On January 5, 2011, Yazzie filed another motion for a new attorney and on January 21, 2011, Yazzie filed another motion for a new attorney stating that counsel had not explained the plea to him and Yazzie wanted less time so he could be with his son. On February 9, 2011, Yazzie pled guilty to an Information in violation of 18 U.S.C. §§ 1153, 2241(a) and 2246(2)(C) .

On May 25, 2011, Yazzie filed a Motion to Dismiss stating that his confession was made "outside the six-hour window" and should be suppressed. On October 6, 2011, the district court removed James Loonam as counsel for Mr. Yazzie and ordered the appointment of new counsel. CR Doc. 54. On November 29, 2011, attorney P. Jeffery Jones filed a Motion to Withdraw Plea of Guilty on behalf of Yazzie and that his confession to the FBI should be suppressed. Yazzie eventually filed another Motion for Dismissal of counsel and on August 8, 2012 new counsel was appointed. Yazzie filed a motion to withdraw his Motion to Dismiss and Motion to Suppress. The district court on June 4, 2013, denied Yazzie's Motions to Withdraw Guilty Plea. Judgment was entered on May 8, 2014 and the district court conducted a sentencing hearing at which time it remanded Yazzie to the custody of the Bureau of Prisons to be imprisoned for a total term of 188 months. He eventually filed a Notice of Appeal of the court's denial of his motion to withdraw his guilty plea. The Court of Appeals dismissed the action. *United States v. Yazzie*, 572 F.App'x 663 (10th Cir. 2014). Now, Yazzie brings this motion pursuant to 28 U.S.C. § 2255 claiming his trial counsel was constitutionally ineffective and asking the court to grant him a withdrawal of his guilty plea.

Yazzie claims that his Fourth Amendment rights were violated by "incompetent counsel lacking knowledge to defend me." CR Doc. 201 Yazzie believes that he was unlawfully coerced to confess and wanted the statement suppressed so he would receive a lower sentence.

Mr. Yazzie makes factual allegations and appears to suggest that he was guilty of a lesser included offense as discussed below.

LAW AND ARGUMENT

A. Defendant's ineffective assistance of counsel claims fail because they do not satisfy the requirements of *Strickland v. Washington*.

Defendant's claims should be denied because they are factually meritless. Moreover, Defendant cannot establish ineffective assistance of counsel because he has not satisfied the test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove his attorney was ineffective, Defendant must show that: (1) his attorney's performance was constitutionally deficient, and (2) he was prejudiced by such deficient performance. *Id. see also, Dulin v. Cook*, 957 F.2d 758, 760 (10th Cir. 1992) ("The 'cause and prejudice' standard applies to pro se prisoners just as it applies to prisoners represented by counsel.").

To show that counsel was constitutionally deficient, a defendant must demonstrate that his "counsel's representation fell below an objective standard of reasonableness." *Miles v. Dorsey*, 61 F.3d 1459, 1474 (10th Cir. 1995) (quoting *Strickland*, 466 U.S. at 688). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Miles*, 61 F.3d at 1474.

To demonstrate prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "It is not enough for a defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. To establish his ineffectiveness claim, furthermore, Defendant must overcome the "strong presumption" that his counsel's performance was adequate, and show that the performance fell "outside the range of

professionally competent assistance." *Id.* at 690. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Miles*, 61 F.3d at 1475 (quoting *Strickland*, 466 U.S. at 700).

In determining whether defendant has been denied effective assistance of counsel, the Court must note the wide range of reasonable professional judgment. *Strickland*, 466 U.S. at 689. Courts must take care to avoid illegitimate second guessing of counsel's strategic decisions from the superior vantage point of hindsight. *Strickland*, 466 U.S. at 669. Moreover, counsel is granted deference in order to avoid later arguments that he or she deemed to be frivolous or not grounded on the pertinent law. Under *Strickland*, Defendant must show both that counsel was constitutionally deficient and that this deficiency resulted in actual prejudice.

Furthermore, the Court can dispose of an ineffectiveness claim for lack of prejudice, without determining whether the alleged errors were legally deficient. *United States v. Haddock*, 12 F.3d 950, 955 (10th Cir. 1993). In the instant case, Yazzie has failed to demonstrate either deficient performance or the requisite prejudice sufficient to undermine confidence in the proceedings.

B. Defendant's Appellate Waiver

Defendant states that his attorney "was ineffective in connection with his appellate waiver in [his] plea agreement." Defendant's Motion, CV Doc. 9, CR Doc. 201. This is a restatement of Defendant's argument on his direct appeal. The Circuit held that the appellate waiver was enforceable stating that Defendant had "not met his burden of demonstrating that his waiver is otherwise unlawful." *Yazzie*, 572 F.App'x at 664. The Court went on to state that Defendant's "contention that he should have been allowed to withdraw his guilty plea and that the district court's denial of his request affected the fairness of the proceedings against him does

not demonstrate that his appeal waiver was unlawful." *Id.* Defendant is seeking to relitigate an issue decided already decided in this case by the Circuit. Federal-prisoner Section 2255 practice does not require a federal court to second-guess itself. Accordingly, when a federal prisoner raises a claim that has been decided on direct review, he ordinarily cannot later attempt to relitigate that claim in a Section 2255 proceeding. *See Withrow v. Williams*, 507 U.S. 680, 720-721 (1993) (Scalia, J., concurring). In support of this claim, Defendant exhumes his contention that his statement to the FBI should have been suppressed. CV Doc. 9, CR Doc. 201. As discussed below, this argument, too, is without merit.

C. Fourth Amendment Claims

Mr. Yazzie argues that his Fourth Amendment rights were violated because of an illegal seizure from Shiprock Tribal Jail. He states that he was "compelled to confess wrongfully" by his counsel at the time and that "he induced him to plead guilty to a harsh offense when otherwise he could have pled guilty to a lesser offense." CV Doc. 9, CR Doc. 201. Defendant filed numerous pro-se motions to suppress his statement. See CR Docs. 47, 49. Defendant's first attorney, Mr. James Loohnam, considered suppression issues and found no meritorious basis to make such a claim as discussed at two hearings to determine counsel. In the May 19, 2011 hearing[1] the District Court in consultation with Defendant and Mr. Loonham recommended a second attorney at the Office of the Federal Public Defendant review Defendant's Case. Ex. 1 at 11-14.

On October 3, 2011, a subsequent hearing[2] on the issue was conducted. Mr. Loonam told the Court in relevant part:

[1] Transcript attached as Exhibit 1.

[2] Transcript attached as Exhibit 2.

> ...we discussed pre-plea of this and all the way through and discussed after May the issues that were brought up in the pro se filings and went over in detail both myself and Ms. Dunleavy's analysis of the issues, and we, you know, tried to weigh them to him as best we could and still suggest that the path that we worked for him, that he decided to take when we were in some active representation, would be in his best interests given what he shared with us.

Ex. 2 at 4-5.

Defendant discussed the issues raised in his motions to suppress with at least two attorneys, "in detail." *Id.* Defendant simply could not accept that his statement to the FBI could not be suppressed. This fixed delusion is evidenced by Defendant's vacillation on keeping Mr. Loonam in correspondence to the District Court:

- "I would like to get me a new attorney couse (sic) Jim Loonam would not get me a Motion to suppress and he won't." (Letter from Willis Yazzie to Judge Browning dated November 8, 2010, P.1, Doc. 25).
- "I just want to say that I'm going to keep Jim couse (sic) I don't think a new one well (sic) get me a better plea." (Letter from Willis Yazzie to Judge Browning dated January 26, 2011, P.1, Doc. 34).
- "I just want to say to you that I don't think Jim is helping me that much and I want to replace him why couse (sic) I wanted to go to trial but he said I would not win so I took the plea for 15 to 19 and now they want to give me life." (Letter from Willis Yazzie to Judge Browning dated May 2, 2011, P.1, Doc. 43),

Defendant plainly states that he wanted a motion to suppress filed and that Mr. Loonham would not file such a motion. The strong inference is that Mr. Loonham considered that issue (and others) and chose not to file a motion because in his professional judgment no meritorious suppression issues existed.

STATEMENT ON EVIDENTIARY HEARING

Defendant has the burden of establishing the need for an evidentiary hearing. *See Birt v. Montgomery*, 725 F.2d 587, 591 (11th Cir.) (en banc.). Under §2255, there is no right to an evidentiary hearing when "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; *see also, United States v. Marr*, 856

F.2d 1471, 1472 (10th Cir. 1988). Likewise, no hearing is required on barred claims. *McClesky v. Zant*, 499 U.S. 467, 494 (1991). Furthermore, a hearing is not required when Defendant's allegations of fact supporting his claims are conclusory and unsupported by the record, demonstrated meritless, or affirmatively contradicted by files and record, and wholly incredible. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). An evidentiary hearing on a claim of ineffective assistance of counsel is required only if the factual allegations, if true, would meet both prongs of the Strickland test. The government asserts that Defendant is not entitled to an evidentiary hearing.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Court deny Defendant's 28 U.S.C. § 2255 motion because Defendant has presented no meritorious claims entitling him to relief.

Respectfully submitted,

DAMON P. MARTINEZ
United States Attorney

Filed electronically 5/29/15
JACOB A. WISHARD
Assistant United States Attorney
201 3rd St. NW, Suite 900
Albuquerque, NM 87103
(505) 224-1402

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. And by operation of that system to, trial counsel for.

This response and attachments will be sent by First Class Mail to:

Willis Yazzie, 54228-051
FCI Big Spring

FEDERAL CORRECTIONAL INSTITUTION
1900 SIMLER AVE
BIG SPRING, TX 79720

Filed electronically
JACOB A. WISHARD
Assistant United States Attorney

APPENDIX C

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

WILLIS YAZZIE,

Petitioner,

v.

CV 14-0894 JB/CG
CR 10-1761 JB

UNITED STATES OF AMERICA,

Respondent.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER is before the Court on Petitioner Willis Yazzie's *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody* ("Petition"), (CV Doc. 9), filed on February 10, 2015, and the *United States' Response to a Motion Pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside or Correct a Sentence by a Person in Federal Custody* ("Response"), (CV Doc. 19), filed May 29, 2015.[1] United States District Judge James O. Browning referred this matter to this Court to make proposing findings and a recommended disposition. (CV Doc. 2). After considering the parties' filings and the relevant law, the Court **RECOMMENDS** that the Petition be **DISMISSED WITH PREJUDICE.**

I. Factual and Procedural Background

Petitioner is incarcerated at the Federal Correctional Institute ("FCI") in Big Spring, Texas. (CV Doc. 9 at 1, 15). On February 9, 2011, pursuant to a *Plea Agreement*, (CR Doc. 38), Petitioner plead guilty to an *Information*, (CR Doc. 35),

[1] Documents referenced as "CV Doc. ___" are from case number 14-cv-0894-JB-CG. Documents referenced "CR Doc. ___" are from case number 10-cr-1761-JB-1.

charging him with aggravated sexual abuse.

Prior to entering his plea, Petitioner filed two motions seeking a new attorney on the grounds that trial counsel, Mr. James Loonam, would not file a motion to suppress, (CR Doc. 25), and that Petitioner could no longer work with counsel because he did not trust him. (CR Doc. 26). Those motions were denied by United States District Judge James O. Browning on December 17, 2010. (CR Doc. 30). Thereafter, Petitioner filed additional motions for new counsel, on the grounds that Petitioner could not work with Mr. Loonam, (CR Doc. 31), that Mr. Loonam had not explained the plea to him, and that he wanted more time with his son. (CR Doc. 32). However, in a letter dated January 26, 2011, Petitioner stated that he wished to retain Mr. Loonam. (CR Doc. 34). Petitioner subsequently pled guilty on February 9, 2011. (CR Doc. 38). Mr. Loonam was his attorney at that time.

On May 2, 2011, Petitioner, proceeding pro se, again filed a letter requesting new counsel. (CR Doc. 43). He also filed a *Motion to Dismiss with Prejudice* on May 25, 2011, (CR Doc. 47), and a *Motion to Suppress* on June 8, 2011. (CR Doc. 49).[2] A hearing was held on May 19, 2011 regarding Petitioner's request for new counsel. During that hearing, Judge Browning denied Petitioner's request for new counsel but allowed a second attorney to consult with Petitioner and address his concerns. (*See* CR Doc. 48). Mr. Loonam then filed a *Motion for Hearing to Determine Counsel*, (CR Doc. 51), which Judge Browning heard on October 3, 2011. (CR Doc. 53). Mr. Loonam's Motion was granted based on a breakdown of communication between counsel and Petitioner, and the Court ordered the appointment of new counsel. (CR Doc. 54).

[2] The *Motion to Dismiss with Prejudice*, (CR Doc. 47), and *Motion to Suppress*, (CR Doc. 49), were later withdrawn by subsequent counsel. (*See* CR Doc. 77).

Subsequently, Petitioner filed two Motions to Withdraw Guilty Plea, (CR Docs. 59 & 64), which were denied by Judge Browning on June 4, 2013.[3] (Doc. 100). Judgment was entered on May 8, 2014, (CR Doc. 158), and, after a hearing, Judge Browning sentenced Petitioner to a 188-month period of incarceration. (CR Doc. 152 at 33). Petitioner then filed a Notice of Appeal of the District Court's denial of his motion to withdraw his guilty plea. (CR Doc. 140). The Tenth Circuit dismissed the appeal. *See United States v. Yazzie*, No. 14-2043, 572 Fed. Appx. 663, 664 (10th Cir. July 23, 2014) (unpublished).

Petitioner now brings this action pursuant to 28 U.S.C. § 2255, asking this court to permit him to withdraw his guilty plea because Mr. Loonam was constitutionally ineffective. (CV Doc. 9 at 4, 15). Respondent argues that Petitioner received effective assistance of counsel, and requests that the Court deny his Petition without a hearing.[4] (CV Doc. 19).

II. Legal Standard

An individual claiming that his sentence "was imposed in violation of the Constitution or laws of the United States" may move a court to vacate, set aside, or correct a sentence by filing a petition under 28 U.S.C. § 2255(a). To obtain habeas relief under § 2255, the petitioner must demonstrate "an error of constitutional magnitude which had a substantial and injurious effect or influence on the verdict." *United States v. Johnson*, 996 F. Supp. 1259, 1261 (D. Kan. 1998) (citing *Brecht v.*

[3] P. Jeffery Jones was appointed to represent Petitioner on October 7, 2011, and filed a *Motion to Withdraw Plea of Guilty*, (Doc. 59), on November 29, 2011. Petitioner filed a pro se *Motion to Withdraw Plea of Guilty*, (CR Doc. 64), on April 12, 2012.

[4] Petitioner also asserts that the Government did not file its Response to his Petition in a timely manner. (CV Doc. 20 at 1). Pursuant to the Court's *Order Granting Third Motion to Extend Deadline to Respond*, (CV Doc. 18), the Government was to respond to the Petition on or before May 29, 2015. On May 29, 2015, the Government filed its Response. (CV Doc. 19). Therefore, the Response was timely.

Abrahamson, 507 U.S. 619, 637-38 (1993)). A court must hold an evidentiary hearing on a § 2255 petition unless the motions, files, and records conclusively show that the prisoner is not entitled to any relief. 28 U.S.C. § 2255(b).

III. Analysis

Petitioner alleges that he was denied effective assistance of counsel because Mr. Loonam failed to file a motion to suppress Petitioner's incriminating statements. (CV Doc. 9 at 4). As a result, Petitioner argues that he pled to a harsher offense than he otherwise would have pled to, and received a harsher sentence. (*Id.*). Petitioner further argues that Mr. Loonam provided ineffective assistance by allowing him to enter a plea agreement in which Petitioner waived his rights to appeal. (*Id.*).

Respondent opposes the Petition and argues that it should be denied without a hearing. (CV Doc. 19 at 1). Respondent contends that Mr. Loonam considered suppression issues in this case, and found no meritorious arguments. (CV Doc. 19 at 5). In addition, Respondent asserts that Petitioner already challenged the waiver of his right to appeal in a direct appeal, which was dismissed by the Tenth Circuit. (CV Doc. 19 at 4-5).

A. Law Regarding Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, Petitioner must satisfy a two-part test. First, Petitioner must show that counsel's performance was deficient because it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Second, Petitioner must show that counsel's deficient performance prejudiced him. *Id.* at 687. To demonstrate that counsel was ineffective, Petitioner must satisfy both prongs outlined in *Strickland*. *See id.* at 687. Accordingly, the Court may

address each of these components in any order, and need not address both if Petitioner makes an insufficient showing on one. *United States v. Dowell*, No. 10-1084, 388 Fed. Appx. 781, 783 (10th Cir. July 21, 2010) (unpublished) (citing *Strickland*, 466 U.S. at 697).

In demonstrating that counsel's performance was deficient under the first prong of the *Strickland* test, "judicial scrutiny of counsel's performance must be highly deferential" and the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The reasonableness of counsel's performance must be evaluated considering all the circumstances. *Id.* at 688.

To establish prejudice under the *Strickland* test, a petitioner must show "that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Where a petitioner alleges ineffective assistance of counsel in connection with a plea agreement, the petitioner must demonstrate that "but for counsel's errors, he would not have pled guilty but rather would have gone to trial." *Neef v. Heredia*, No. 09-2200, 2010 WL 286562, at *2 (10th Cir. Jan. 26, 2010) (unpublished) (citing *Hill v. Lockhart*, 474 U.S. 52, 56-59 (1985)); *see also United States v. Abston*, No. 10-5091, 401 Fed. Appx. 357, 362 (10th Cir. Nov. 5, 2010) (unpublished).

In addition, when a petitioner's allegation of ineffective assistance of counsel is predicated on a failure to move to suppress an incriminating statement, he must prove "that there is merit to his contention that his incriminating statements should have been suppressed." *Dowell*, 388 Fed. Appx. at 783-84 (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)).

B. Trial Counsel's Performance

Petitioner alleges that he was denied effective assistance of counsel because Mr. Loonam failed to file a motion to suppress Petitioner's incriminating statements. (CV Doc. 9 at 4). As a result, Petitioner argues that he pled to a harsher offense than he otherwise would have pled to, and received a harsher sentence. (*Id.*). Petitioner further argues that Mr. Loonam provided ineffective assistance by allowing him to enter a plea agreement in which Petitioner waived his right to appeal. (*Id.*).

Respondent contends that the record reflects that Mr. Loonam considered suppression issues in this case, and found no meritorious arguments. (CV Doc. 19 at 5). Therefore, Respondent argues, Petitioner did not receive ineffective assistance of counsel. In addition, Respondent asserts that Petitioner already challenged the waiver of his right to appeal in a direct appeal, which was dismissed by the Tenth Circuit. (CV Doc. 19 at 4-5).

1. Trial Counsel's Failure to File a Motion to Suppress

Petitioner argues that Mr. Loonam was constitutionally ineffective because he failed to file a motion to suppress Petitioner's incriminating statements. (CV Doc. 9 at 4). Respondent contends Petitioner has failed to demonstrate either deficient performance or the requisite prejudice resulting from that performance. (CV Doc. 19 at 4). Specifically, Respondent argues that Petitioner cannot show that Mr. Loonam's performance in connection with the motion to suppress was deficient. (CV Doc. 19 at 5-6). Respondent further asserts that Petitioner has failed to allege facts that, if true, would meet both prongs of the *Strickland* test for ineffective assistance of counsel. (CV Doc. 19 at 6-7). Respondent argues that, as a result, this matter should be decided on

the Petition, files, and records of this case, as there is no need to hold an evidentiary hearing. (*Id.*).

a. Whether Trial Counsel's Failure to File a Motion to Suppress Rendered His Performance Deficient

Petitioner argues that Mr. Loonam should have filed a motion to suppress incriminating statements he had made to law enforcement. (CV Doc. 9 at 4). Respondent contends that Mr. Loonam considered suppression issues, had determined that there were no meritorious grounds for suppressing Petitioner's statements, and therefore did not file a motion to suppress. (CV Doc. 19 at 5-6).

In determining whether counsel's performance falls below an objective standard of reasonableness, "counsel should be strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *United States v. Rushin*, 642 F.3d 1299, 1307 (10th Cir. 2011) (internal citations and quotations omitted). "'Strategic or tactical decisions on the part of counsel are presumed correct, unless they were completely unreasonable, not merely wrong, so that they bear no relationship to a possible defense strategy.'" *United States v. Jordan*, No. 13-3033, 516 Fed. Appx. 681, 682 (10th Cir. June 5, 2013) (unpublished) (citing *Moore v. Marr*, 254 F.3d 1235, 1239 (10th Cir. 2001)). Accordingly, "to overcome the presumption of objective reasonableness, 'the defendant [has] the burden of showing that counsel's action or inaction was not based on a valid strategic choice.'" *United States v. Cervantes*, No. 07-2167, 267 Fed. Appx. 741, 743 (10th Cir. Feb. 27, 2008) (unpublished) (citing *Bullock v. Carver,* 297 F.3d 1036, 1047 (10th Cir.2002)).

Here, Petitioner alleges that he had been compelled to confess to law enforcement in violation of his constitutional rights, and that, when he asked Mr.

Loonam to suppress the confession, Mr. Loonam advised that there was no legal basis to suppress the statements. (Doc. 9 at 4). Petitioner contends that this advice was "legally incorrect." (*Id.*). However, Petitioner has not provided the Court with any facts to suggest Mr. Loonam's advice was legally incorrect. Moreover, even assuming Mr. Loonam's advice was incorrect, "to show deficient performance, [Petitioner] must show that his counsel's performance was 'completely unreasonable, not merely wrong.'" *United States v. Eaton*, No. 00-6454, 20 Fed. Appx. 763, 768 (10th Cir. Sept. 20, 2001) (unpublished) (citing *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997)). Petitioner has alleged no facts which, taken as true, suggest that Mr. Loonam's performance in failing to file a motion to suppress was completely unreasonable.

Without additional factual allegations that Mr. Loonam's performance in connection with Petitioner's incriminating statements was objectively unreasonable, Petitioner fails to state a viable claim. *Jordan*, 516 Fed. Appx. at 682. The Court notes that "'although we must liberally construe [d]efendant's pro se petition, we are not required to fashion [d]efendant's arguments for him where his allegations are merely conclusory in nature and without supporting factual averments.'" *Id.* at 682 (citing *United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994)).

Moreover, as Respondent argues, a review of the record reveals that Mr. Loonam had considered suppression arguments, and decided that there was no meritorious basis to make such a claim. This issue was discussed in two hearings in Petitioner's underlying criminal case. Indeed, Judge Browning denied Petitioner's request for new counsel, but allowed a second attorney to consult with Petitioner and address his concerns. (*See* CR Doc. 48). Petitioner met with another attorney, Assistant

Federal Public Defender, Susan Dunleavy, on June 23, 2011 to review his entire case, his pro se filings, the presentence report, and the Plea Agreement.[5] (CR Doc. 51 at 2). At a subsequent hearing to determine counsel on October 3, 2011, Mr. Loonam explained to the Court that he and Ms. Dunleavy had discussed the issues that were raised in Petitioner's pro se filings, and confirmed that the steps taken in the case were in Petitioner's best interest. (CR Doc. 211-3 at 4-5). Petitioner does not dispute that he discussed the suppression issues with two attorneys, and admits that his attorney explained to him that there was no legal basis for a motion to suppress. (CV Doc. 9 at 4).

The record establishes that Mr. Loonam and another attorney in his office considered the suppression issues in Petitioner's case, and they both agreed that it was not in Petitioner's best interest to challenge those issues. Petitioner has not presented any facts that suggest otherwise. Therefore, Petitioner has failed to meet his burden of rebutting the presumption that counsel acted objectively reasonable. As a result, this Court finds that Petitioner has failed to satisfy the first prong of the *Strickland* standard.

b. Whether Petitioner Was Prejudiced by Trial Counsel's Deficient Performance

Even assuming that counsel's performance fell below an objective standard of reasonableness, Petitioner also fails to demonstrate that any deficient performance prejudiced his defense. Petitioner argues that as a result of Mr. Loonam's failure to file a motion to suppress his incriminating statements, Petitioner pled to a harsher offense than he otherwise would have pled to, and that he received a harsher sentence. (CV

[5] Petitioner filed a letter with the Court, (CR Doc. 46 at 1), on May 15, 2011, and a pro se *Motion to Suppress*, (CR Doc. 49), on June 8, 2011, in which he seeks to suppress statements made to law enforcement.

Doc. 9 at 4). Respondent does not specifically respond to this argument, and argues generally that Petitioner has failed to demonstrate either deficient performance or requisite prejudice under the *Strickland* test. (CV Doc. 19 at 4). Fed. R. Civ. 7 or 8 requires respondent to respond to all or each allegation

To establish prejudice under the *Strickland* test, a petitioner must show "that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Where a petitioner alleges ineffective assistance of counsel in connection with a plea agreement, the petitioner must demonstrate that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). "[A] petitioner's 'mere allegation' that he would have insisted on trial but for counsel's errors, although necessary, is insufficient to entitle him to relief." *Miller*, 262 F.3d at 1072 (citing *United States v. Gordon*, 4 F.3d 1567, 1571 (10th Cir. 1993)). Courts also look to the factual circumstances surrounding the plea to determine whether a petitioner would have proceeded to trial. *Id.*

Here, Petitioner asserts that, had Mr. Loonam filed the motion to suppress, he would have pled guilty to a lesser offense and would have recevied a lesser sentence. (CV Doc. 9 at 4). Petitioner does not even allege that, but for Mr. Loonam's failure to file a motion to suppress, he would have insisted on proceeding to trial. Not required to show or allege Yazzie would have gone to trial. The different outcome would have reasonably been lesser charges and lesser punishment.

Further, the factual circumstances surrounding the plea do not suggest that Petitioner would have proceeded to trial. *See Miller*, 262 F.3d at 1072. Indeed, as the District Court has already noted, at the plea hearing before former United States Chief Magistrate Judge Richard L. Puglisi, Petitioner acknowledged that a jury would have found him guilty if he proceeded to trial. (Doc. 100 (citing Federal Tape Recorder at

12:14:22-12:16:04)). Petitioner has not provided the Court with any other factual allegations suggesting he would not have pled guilty and would have insisted on going to trial. (CV Doc. 9 at 4). Lafler v. Cooper. IAC in plea process, not just in decision to plead generally but IAC in decision to plead with

Lastly, Petitioner does not allege any facts which suggest that the motion to tainted coerced confession. suppress would have been meritorious. *See Jordan*, 516 Fed. Appx. at 682 (finding the petitioner's conclusory allegations that his attorneys were ineffective in failing to present a Fourth Amendment claim insufficient where petitioner failed to present any facts to suggest there was a meritorious Fourth Amendment challenge). Again, while the Court notes that Petitioner's pro se filings are to be "construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers," *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), "the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (citing *Hall*, 935 F.2d at 1110).

No probable cause to begin with Argument insufficient information to hold Yazzie initially. Why?

The law requires a stmnt to be suppres when the following conditions are met:

In conclusion, even assuming that Mr. Loonam's performance was deficient under the first prong of *Strickland*, Petitioner does not allege sufficient facts to demonstrate that, but for Mr. Loonam's failure to file the motion to suppress, the result of this proceeding would have been different. Therefore, Petitioner also fails to meet the second prong of the *Strickland* test for ineffective assistance of counsel.

2. *Trial Counsel's Performance in Connection with the Appellate Waiver*

Petitioner also states that he was denied effective assistance of counsel because Mr. Loonam allowed him to enter a plea agreement waiving his right to appeal. (CV Doc. 9 at 4). Respondent contends Petitioner has already challenged the appellate

waiver in the plea agreement on his direct appeal of the District Court's denial of his motion to withdraw his guilty plea. (CV Doc. 19 at 4-5). Respondent maintains that Petitioner should not be afforded an opportunity to relitigate this claim. (*Id.*).

However, in Petitioner's direct appeal, the Tenth Circuit did not consider whether trial counsel was ineffective in allowing Petitioner to enter a plea agreement waiving his right to appeal. *Yazzie*, 572 Fed. Appx. at 663-64 (stating that Petitioner argues only that the appeal waiver is otherwise unlawful, not that he received ineffective assistance of counsel). Instead, the *Yazzie* Court dismissed Petitioner's appeal because Petitioner had failed to demonstrate that the appellate waiver was "otherwise unlawful." *Yazzie*, 572 Fed. Appx. at 664. As a result, the Court does not consider Petitioner's claim to be an attempt to relitigate what has already been decided on direct review.

That being said, Petitioner does not provide any additional factual allegations surrounding the circumstances in which he entered the plea agreement or the appellate waiver. Instead, he supports this claim by stating that he received ineffective assistance of counsel based on Mr. Loonam's failure to file a motion to suppress. (CV Doc. 9 at 4). Therefore, the Court construes the Petition to allege that, but for Mr. Loonam's failure to file a motion to suppress, Petitioner would not have entered a plea agreement in which he waived his rights to appeal. *See Hall*, 935 F.2d at 1110 ("A pro se litigant's pleadings are to be construed liberally..."). In light of the discussion above, Petitioner has not demonstrated that he received ineffective assistance of counsel because of Mr. Loonam's failure to file a motion to suppress his incriminating statements. Therefore, Petitioner has not sufficiently alleged that he was denied effective assistance of counsel because Mr. Loonam allowed him to enter a plea agreement waiving his right to appeal.

IV. Recommendation

For the reasons discussed above, the Court finds that Petitioner has failed to allege that he was denied effective assistance of counsel in violation of his Sixth Amendment rights based on Mr. Loonam's failure to file a motion to suppress his incriminating statements. Because the motions, files, and records conclusively show that Petitioner is not entitled to any relief, the Court will not hold a hearing in this case. *See* 28 U.S.C. § 2255(b). Therefore, the Court **RECOMMENDS** that Petitioner Willis Yazzie's *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody*, (CV Doc. 9), be **DISMISSED WITH PREJUDICE**. The Court further recommends that a certificate of appealability be **DENIED**.

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**

THE HONORABLE CARMEN E. GARZA
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

United States (
V. (Case: 1:14-cv-00894-JB
YAZZIE, Willis (

Affadavit

This is to the best of my knowledge before I took the plea. I ask my attorney James Loonam a number of times to suppress my statement and he would just say I can't because I waive my right nder Miranda warning. I would ask him again and again but get the same answer.

I than sent my own motion to suppress statement to the court and it would just be sent to my ttorney Jim. Jim would come to see me at R.C.C. in Albuquerque and tell me not to send letters to the court. Jim would tell me he is working on a plea.

In Nov. 2010 I sent a letter to the court to dismiss my attorney James Loonam because he would not ppress my statement and the court denied my request.

My attorney would come and see me at R.C.C. to tell me that he is got me a plea for 15 to 20 years and I ld him I don't want it because it is to much time for a crime I did not do. I told him I did not penetrate JD1 or give JD2 S.T.D.. I told him I'll take the plea if I lose my suppression. My attorney told me I can ake the plea after I lose the suppression because it is part of the trial. My attorney said if I suppress m tatement I have to go to trial. I told him let me think about it.

My attorney than call my brother ~~and~~ James Yazzie and told him to tell me to take the plea. I cal me and my brother than tell ~~me~~ me what my attorney said. My brother told me to take the plea ~~because~~ only if I

My attorney would come and see me again and ask what I think about the plea. I told him ~~because~~ t something lower than 15 to 20 years. I told him I still want to suppress my statement. He than tol ; even if I win my suppression the government well use the S.T.D. of ~~JD1~~ JD2 for evidence because I d it. That when I thought there no use to suppress my statement. I told my attorney the only way I take to plea is if they reinvestagate the girls.

My attorney then came back with the plea what it said they well reinvestagate the girls after sentence and the plea was for 15 to 19 years. So I took the plea ~~cause~~ because my brother told to and there was no use to suppress my statement if the government is going to use JD2 TD..

Did my attorney had the right ~~advice~~ advice for me not to suppress my statement? See Dunaway v. New York 442 US 200

Is it right for my attorney to tell my brother for me to take the plea?

Could the government use the ~~S.T.D.~~ S.T.D. of JD2 against me for evidence when ~~I had it back~~ ?

the last time I got it and had it ~~in 2008~~ was in 2008?
Could JDZ carry the STD from 2008 to 2010?
Where my attorney advices ~~advice~~ and performance proficient?
Was my attorney right when he said I can't take a plea after ~~so~~ suppression hearing?

On the morning hours of May 10, 2010 I was in Shiprock, NM Trible Jail and a Jailer call my name and took me out of the cell. I follow him to booking and he put me in a small cell. I was in the cell waiting and their was a Jailer walking by and I ~~ad~~ ask why I was waiting in the cell. The Jailer came back and told me the Federal agent is coming to pick me up.

The Jailer came back and took me out and there was a F.B.I agent waiting. The F.B.I. ask if I was ready to go and they told him they have to put restraint on me first. The F.B.I. told me his name was Dustin Grant and want to ash me some question at the BIA police ~~office~~ station.

After my restraint were put on the F.B.I. got a hold of my arm and took me to a S.U.V that was waiting outside. The driver was already in the S.U.V. and it was C.I. Louis St. Germaine. On our way to the BIA, ~~office~~ station Dustin ask me ~~wat~~ what grade I went up to and I told him 10th.

When we got at the BIA police station Dustin walk me into a room with just a table, chairs, and a big mirrow.

Dustin ask me if I knew why I was there and I told him that I was told by Shiprock Trible police that I was on hold for a Federal offense. Dustin than inform me of my Miranda rights. I waive my rights under the 5th and 6th Amendment. These is when I confess wrongfully.

Did Dustin Grant have probable cause to pick me up from Shiprock Trible Jail?
See Dunaway v. New York, 442 US 200.
Can my statement be suppress under Dunaway?
Was my 4th Amendment violated?
Should of my attorney James Loonam suppress my statement under the 4th Amendment?

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true to the best of my know-

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

1:14-cv-00894-JB

Willis John Yazzie Sr.-Petitioner,

v.

United States of America-Respondent.

AFFIDAVIT OF PETITIONER

This is to the best of my knowledge, before I took the plea. I ask my Attorney James Loonam a number of times to suppress my statement and he would just say I can't because I waive my rights under Miranda Warning. I would ask him again and again but get the same answer.

I than sent my own motion to suppress statement to the court and it would just be sent to my Attorney Jim. Jim would come to see me at R.C.C. in Albuquerque and tell me not to send letter to the court. Jim would tell me he is working on a plea.

In November 2010 I sent a letter to the court to dismiss my attorney James Loonam because he would not suppress my statement and the court denied my request.

My attorney would come and see me at R.C.C. to tell me that he got a plea for 15 to 20 years and I told him I don't want it because it is to much time for a crime I did not do. I told him I did not penetrate JD1 or give JD2 S.T.D.. I told him I'll take the plea if I lose my suppression. My attorney told me I cannot take the plea after I lose the suppression because it is part of the trial. Mr attorney said if I suppress my statement I have to go to trial. I told him let me think about it.

My attorney than call my brother James Yazzie and told him to tell me to take the plea. I call home and my brother than tell me what my attorney said. Mr brother told me to take the plea.

My attorney would come and see me again and ask what I think about the plea. I told him only if I get something lower than 15 to 20 years. I told him I still want to suppress my statement. He than told me even if I win my suppression the government well use the S.T.D. of JD2 for evidence because I had it. That's when I thought there no use to suppress my statement. I told my attorney the only way I'll take the plea is if they reinvestigate the girls.

My attorney then came back with the plea where it said they well reinvestigate the girls after my sentence and the plea was for 15 to 19 years. So I took the plea because my brother told me to and there was no use to suppress my statement if the government is going to use JD2's S.T.D..

Did my attorney had the right advice for me not to suppress my statement? See **Dunaway v. New York**, 442 U.S. 200(1979)

Is it right for my attorney to tell my brother for me to take the plea?

Could the government use the S.T.D. of JD2 against me for evidence when the last time i got it and had it was in 2008?

Could JD2 carry the S.T.D. from 2008 to 2010?

Where my attorney advices and performance proficient?

Was my attorney right when he said I can't take a plea after suppression hearing?

On the morning hours of May 10, 2010 I was in Shiprock, NM Tribal Jail and a jailer call my name and took me out of the cell. I follow him to booking and he put me in a small cell. I was in the cell waiting and their was a jailer walking by and I ask why I was waiting in the cell. The jailer came back and told me the Federal agent is coming to pick me up.

The jailer came back and took me out and there was a F.B.I. agent waiting. The F.B.I. ask if I was ready to go and they told him they have to put restraint on me first. The F.B.I. told me his name was Dustin Grant and

put restraint on me first. The F.B.I. told me his name was Dustin Grant and want to ask me some questions at the BIA Police Station.

After my restraint were put on the F.B.I. got a hold of me arm and took me to a SUV that was waiting out side. The driver was already in the SUV and it was C.I. Louis St. Germaine. On our way to the BIA Station Dustin ask me what grade. I went up to and I told him 10th.

When we got at the BIA Police Station Dustin walk me into a room with just a table, chairs, and a big mirror.

Dustin ask me if I know why I was there and I told him that I was told by Shiprock Tribal Police that I was on hold for a Federal offense. Dustin than inform me of my Miranda rights. I waive my right s under the 5th and 6th Amendment. This is where I confess wrongfully.

Did Dustin grant have probable cause to pick me up from Shiprock Tribal Jail? See **Dunaway v. New York**, 442 U.S. 200(1979).

Can my statement be suppress under **Dunaway**?

Was my 4th Amendment violated?

Should of my Attorney James Loonam suppress my statement under the 4th Amendment?

I declare (or certify, verify or state) under penalty of perjury that the foregoing is true to the best of my knowledge.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

WILLIS YAZZIE,

Petitioner,

v.

No. CIV 14-0894 JB/CG
CR 10-1761 JB

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER ADOPTING THE MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on the United States Magistrate Judge's Proposed Findings and Recommended Disposition, filed July 22, 2015 (CV Doc. 21)("PFRD"). In the PFRD, the Honorable Carmen E. Garza, United States Magistrate Judge for the District of New Mexico, concluded that Petitioner Willis Yazzie has failed to demonstrate that he was denied effective assistance of counsel in violation of his rights under the Sixth Amendment to the Constitution of the United States of America and recommended that the Court dismiss with prejudice his Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody, filed February 10, 2015 (CV Doc. 9)("Petition").[1]

Judge Garza notified the parties that written objections to the PFRD were due within fourteen days. See PRFD. Yazzie filed an Affidavit on August 3, 2015 (CV Doc. 22)("Objections"). After a de novo review of the record and the PFRD, the Court adopts Judge Garza's PFRD in its entirety.

[1]The Court refers to documents from case No. CIV 14-0894 JB/CG as "CV Doc. ___." The Court refers to documents from case number No. CR 10-1761 JB as "CR Doc. ___."

PROCEDURAL BACKGROUND

Yazzie is incarcerated at the Federal Correctional Institute in Big Spring, Texas. See Petition at 1, 15. On February 9, 2011, pursuant to a Plea Agreement, filed February 9, 2011 (CR Doc. 38), Yazzie plead guilty to an Information, filed February 9, 2011 (CR Doc. 35), charging him with aggravated sexual abuse.

Before entering his plea, Yazzie filed several motions seeking a new attorney based on various grounds. See Letter from Willis Yazzie to the Court (dated November 8, 2010), filed November 12, 2010 (CR Doc. 25); Defendant's Motion to Dismiss James Loonam as his Attorney (dated November 12, 2010), filed November 15, 2010 (CR Doc. 26); Defendant's Motion to Dismiss James Loonam as his Attorney (dated December 29, 2011), filed January 5, 2011 (CR Doc. 31); Letter from Willis Yazzie to the Court (dated January 17, 2011), filed January 21, 2011 (CR Doc. 32). Yazzie then indicated that he wished to retain trial counsel. See Letter from Willis Yazzie to the Court (dated January 26, 2011), filed January 26, 2011 (CR Doc. 34). Yazzie subsequently pled guilty on February 9, 2011. See Plea Agreement, filed February 9, 2011 (CR Doc. 38). James Loonam was his attorney during this time.

After entering his plea, Yazzie, pro se, again sent a letter to the Court, requesting new counsel on May 2, 2011. See Letter from Willis Yazzie to the Court (dated May 2, 2011), filed May 2, 2011 (CR Doc. 43). He also filed a Motion to Dismiss with Prejudice on May 25, 2011 (CR Doc. 47), and a Motion to Suppress on June 8, 2011 (CR Doc. 49).[2] The Court held a hearing on May 19, 2011, regarding Yazzie's request for new counsel. During that hearing, the Court denied Yazzie's request for new counsel, but allowed a second attorney to consult with

[2]The new counsel withdrew the Motion to Dismiss with Prejudice, filed May 25, 2011 (CR Doc. 47), and the Motion to Suppress, filed June 8, 2011 (CR Doc. 49). See Defendant Willis Yazzie's Notice of Withdrawal of Certain Motions, filed August 17, 2012 (CR Doc. 77).

Yazzie and address his concerns. See Memorandum Opinion and Order, filed June 7, 2011 (CR Doc. 48). Mr. Loonam then filed a Motion to Determine Counsel, filed August 10, 2011 (CR Doc. 51)("Motion to Determine Counsel), which the Court heard on October 3, 2011. See Clerk's Minutes Before the Honorable James O. Browning, filed October 3, 2011 (CR Doc. 53). The Court granted Mr. Loonam's motion based on a breakdown of communication between Yazzie and Mr. Loonam, and the Court ordered the appointment of new counsel.[3] See Memorandum Opinion and Order, filed October 6, 2011 (CR Doc. 54). The Court entered Judgment on May 8, 2014 (CR Doc. 158), and, after a hearing, the Court sentenced Yazzie to a 188-month period of incarceration. See Memorandum Opinion and Order at 33, filed May 7, 2014 (CR Doc. 152).

On October 3, 2014, Yazzie requested habeas review of his conviction pursuant to 28 U.S.C. § 2255, asking the Court to permit him to withdraw his guilty plea because Mr. Loonam was constitutionally ineffective based on his failure to file a motion to suppress Yazzie's incriminating statements. See Petition at 4, 15. Yazzie argued that, as a result, he pled to a more serious offense than he otherwise would have pled, and received a harsher sentence. See Petition at 4. Yazzie further argued that Mr. Loonam provided ineffective assistance by allowing him to enter a plea agreement in which Yazzie waived his right to appeal. See Petition at 4. The Court referred this matter to Judge Garza to conduct analysis, and to make findings of fact and a recommended disposition. See Order of Reference Relating to Bankruptcy Appeals, Social Security Appeals, Prisoner Cases, Non Prisoner Pro Se Cases and Immigration Habeas Corpus Proceedings, filed October 6, 2014 (CV Doc. 2). Judge Garza concluded that the Court should dismiss Yazzie's claim with prejudice, because Yazzie fails to demonstrate that he was denied effective assistance of counsel in violation of his Sixth Amendment rights.

[3]Mr. P. Jeffery Jones was appointed to represent Yazzie on October 7, 2011.

Specifically, after considering all of the evidence in the record, Judge Garza determined that Yazzie has not demonstrated that Mr. Loonam provided ineffective assistance of counsel either by failing to file a motion to suppress Yazzie's incriminating statements or by allowing Yazzie to enter a plea agreement in which Yazzie waived his right to appeal. See PFRD at 11, 12. Accordingly, Judge Garza recommended that the Court dismiss with prejudice all of Yazzie's claims for habeas relief. See PFRD at 13.

In the PFRD, Judge Garza explained that, to establish ineffective assistance of counsel, Yazzie must show that counsel's performance was deficient, because it fell below an objective standard of reasonableness, see Strickland v. Washington, 466 U.S. 668, 687-88 (1984), and that counsel's deficient performance prejudiced him. See Strickland v. Washington 466 U.S. at 687. In determining whether counsel's performance falls below an objective standard of reasonableness, "counsel should be strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." United States v. Rushin, 642 F.3d 1299, 1307 (10th Cir. 2011)(internal citations and quotations omitted). Indeed, "'[s]trategic or tactical decisions on the part of counsel are presumed correct, unless they were completely unreasonable, not merely wrong, so that they bear no relationship to a possible defense strategy.'" United States v. Jordan, No. 13-3033, 516 F. App'x 681, 682 (10th Cir. June 5, 2013)(unpublished)[4](citing Moore v. Marr, 254 F.3d 1235, 1239 (10th Cir. 2001)).

[4]United States v. Jordan is an unpublished opinion, but the Court can rely on an unpublished opinion to the extent its reasoned analysis is persuasive in the case before it. See 10th Cir. R. 32.1(A), 28 U.S.C. ("Unpublished opinions are not precedential, but may be cited for their persuasive value."). The Tenth Circuit has stated:

> In this circuit, unpublished orders are not binding precedent, . . . and we have generally determined that citation to unpublished opinions is not favored. However, if an unpublished opinion or order has persuasive value with respect to

Upon review of the record, Judge Garza first found that, while Yazzie alleges that Mr. Loonam's advice had been "legally incorrect," Yazzie has not demonstrated that Mr. Loonam's failure to file a motion to suppress his incriminating statements had been objectively unreasonable. In addition, Judge Garza notes that Mr. Loonam, along with another attorney, considered suppression arguments and decided that there was no meritorious basis to make such a claim. As a result, Judge Garza concludes that Yazzie has failed to demonstrate that counsel was objectively unreasonable in failing to file a motion to suppress.

Yazzie then filed Objections, which the Court construes as Petitioner's objections to Judge Garza's findings.[5] See Objections at 1-2. In his Objections, Yazzie provides additional facts surrounding his conversations with Mr. Loonam regarding filing a motion to suppress in his case. Yazzie suggests that these facts indicate Mr. Loonam's performance was deficient. See Objections at 1. Yazzie also states that Mr. Loonam told Yazzie's brother to tell Yazzie to take the plea offered to him. See Objections at 1. Finally, Yazzie describes his detention by tribal and federal law enforcement on May 10, 2010, and his subsequent confession. See Objections at 2. The United States has not responded to Yazzie's Objections.

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a material issue in a case and would assist the court in its disposition, we allow a citation to that decision.

United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005)(citations omitted). The Court concludes that the following cases have persuasive force with respect to a material issue, and will assist the Court in its preparation of this Memorandum Opinion and Order: United States v. Jordan, No. 13-3033, 516 F. App'x 681 (10th Cir. June 5, 2013); United States v. Eaton, No. 00-6454, 20 F. App'x 763 (10th Cir. Sept. 20, 2001); and United States v. Hinson, No. 11-3286, 475 F. App'x 298 (10th Cir. Apr. 11, 2012).

[5]The Court must construe the filings of a pro se litigant liberally and hold them to a less stringent standard than formal pleadings that lawyers drafted. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

LAW REGARDING OBJECTIONS TO THE MAGISTRATE JUDGE'S RECOMMENDATIONS

Pursuant to Rule 8 of the Rules Governing Section 2255 Proceedings for the United States District Courts, a district judge may, under 28 U.S.C. § 636(b), refer a pretrial dispositive motion to a Magistrate Judge for proposed findings of fact and recommendations for disposition. Within fourteen days of being served, a party may file objections to this recommendation. See Rule 8(b) of the Rules Governing § 2255 Proceedings. A party may respond to another party's objections within fourteen days of being served with a copy; the rule does not provide for a reply. See Fed. R. Civ. P. 72(b).[6]

When resolving objections to a Magistrate Judge's recommendation, the district judge must make a de novo determination regarding any part of the recommendation to which a party has properly objected. See 28 U.S.C. § 636(b)(1)(C). Filing objections that address the primary issues in the case "advances the interests that underlie the Magistrate's Act, including judicial efficiency." United States v. One Parcel of Real Prop., With Bldgs., Appurtenances, Improvements, and Contents, 73 F.3d 1057, 1059 (10th Cir. 1996). Objections must be timely and specific to preserve an issue for de novo review by the district court or for appellate review. See United States v. One Parcel of Real Prop., With Bldgs., Appurtenances, Improvements, and Contents, 73 F.3d at 1060. Additionally, issues "raised for the first time in objections to the magistrate judge's recommendation are deemed waived." Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996). See United States v. Garfinkle, 261 F.3d 1030, 1030–31 (10th Cir. 2001).

[6]The Federal Rules of Civil Procedure may be applied to the extent that they are not inconsistent with any statutory provisions or the Rules Governing Section 2255 Proceedings. See Rule 12 of the Rules Governing § 2255 Proceedings.

ANALYSIS

This Court agrees with Judge Garza's analysis. Yazzie does not identify any factual or legal errors in Judge Garza's reasoning. In his Objections, Yazzie continues to question whether Mr. Loonam's advice was legally correct, but he does not provide any facts that suggest Mr. Loonam's performance was objectively unreasonable. As Judge Garza stated in her PFRD, even assuming Mr. Loonam's advice was incorrect, "to show deficient performance, [Yazzie] must show that his counsel's performance was 'completely unreasonable, not merely wrong.'" United States v. Eaton, No. 00-6454, 20 F. App'x 763, 768 (10th Cir. Sept. 20, 2001)(unpublished)(citing Hoxsie v. Kerby, 108 F.3d 1239, 1246 (10th Cir. 1997)). Even throughout his objections, Yazzie continues to maintain that he discussed the suppression issues with Mr. Loonam and that Mr. Loonam explained to him that there was no legal basis for a motion to suppress, and provides no facts which suggest that Mr. Loonam's performance was objectively unreasonable. See Objections at 1. The Court therefore also finds that Yazzie has not met his burden to demonstrate that Mr. Loonam's performance was constitutionally deficient.

Yazzie's additional factual allegations do not convince the Court to reach a different conclusion. Yazzie states that Mr. Loonam told his brother to tell him to take the plea offered to him. See Objections at 1. To the extent that Yazzie is alleging he was denied effective assistance of counsel based on these facts, Yazzie raises this argument for the first time in his Objections, and this argument is therefore deemed waived. Marshall v. Chater, 75 F.3d at 1426. See also United States v. Garfinkle, 261 F.3d at 1030-31 ("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived."). In any case, the Court does not think these new facts add much to the ineffective assistance of counsel analysis.

It is clear that Mr. Loonam wanted Yazzie to take the plea offer; that he may have told Yazzie's brother that fact does not add anything to the analysis.

Similarly, Yazzie's factual allegations describing his detention by tribal and federal law enforcement on May 10, 2010, and his subsequent confession are insufficient to overcome the presumption that Mr. Loonam's decision not to file a motion to suppress was reasonable. Indeed, attorneys are afforded a "good deal of leeway under the *Strickland* standard." United States v. Hinson, No. 11-3286, 475 F. App'x 298, 303–04 (10th Cir. Apr. 11, 2012) (unpublished)(internal citations omitted). "In formulating a defense strategy, counsel is entitled to 'balance limited resources in accord with *effective* trial tactics and strategies,' or, in other words, to critically undertake a cost/benefit analysis of any proposed course of action." United States v. Rushin, 642 F.3d at 1308 (citing Harrington v. Richter, 562 U.S. 86, 89 (2011)(emphasis added)). The relevant question becomes whether Mr. Loonam's failure to file a motion to suppress, "if error at all, was an error 'so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" United States v. Rushin, 642 F.3d at 1308 (citing Harrington, 562 U.S. at 89).

Yazzie has provided facts challenging the lawfulness of his initial arrest to again suggest that his confession was unconstitutionally obtained and that Mr. Loonam's legal advice was incorrect. See Objections at 2. These facts do not, however, demonstrate that Mr. Loonam's failure to file a motion to suppress his confession was an error so serious that Mr. Loonam was not functioning as the "counsel" guaranteed Yazzie. As Judge Garza stated in the PFRD, the record shows that Mr. Loonam considered suppression arguments and had decided it was in Yazzie's best interest not to pursue them. See Redacted Transcript of Motion Hearing before the Honorable James O. Browning at 4–5, filed June 23, 2015 (CR Doc. 211-3). Furthermore,

Yazzie had been provided an opportunity to discuss the suppression issues with a second attorney who agreed with Mr. Loonam that pursuing those claims was not in Yazzie's best interest. See Motion to Determine Counsel at 2.

As a result, the Court concludes that Yazzie has not met his burden to show that his counsel's performance was deficient because it fell below an objective standard of reasonableness. The Court therefore agrees with Judge Garza's conclusion that Yazzie has not demonstrated that he received ineffective assistance of counsel and with her recommendation that the Court should dismiss the Petition with prejudice.

In conclusion, Yazzie has not pointed out any factual or legal errors in Judge Garza's analysis of the Petition's claims. The Court concludes that Judge Garza conducted the proper analysis and correctly concluded that the Court should dismiss Yazzie's claims with prejudice. The Court will therefore overrule Yazzie's objections.

IT IS ORDERED, that the United States Magistrate Judge's Proposed Findings and Recommended Disposition, filed July 22, 2015 (CV Doc. 21)("PFRD"), is adopted and the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody, filed February 10, 2015 (CV Doc. 9)("Petition"), is dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

Counsel:

Willis J. Yazzie
Big Spring, Texas

Plaintiff pro se

Jacob Wishard
Assistant United States Attorney
Albuquerque, New Mexico

Attorney for the Defendant

APPENDIX F

FILED
United States Court of Appeals
Tenth Circuit

February 4, 2016

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIS YAZZIE,

Defendant - Appellant.

No. 15-2199
(D.C. Nos. 1:14-CV-00894-JB-CG &
1:10-CR-01761-JB-1)
(D.N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **GORSUCH**, **O'BRIEN**, and **BACHARACH**, Circuit Judges.

After Willis Yazzie pleaded guilty to aggravated sexual abuse and waived his right to appeal he filed a collateral challenge under 28 U.S.C. § 2255, alleging ineffective assistance of counsel. The district court denied relief. Mr. Yazzie now asks us to grant him a certificate of appealability (COA) to contest the district court's judgment. But we do not see how we can. We may issue a COA only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). And that much we do not see, even construing Mr. Yazzie's pro se filings as liberally as we might.

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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.

Mr. Yazzie contends that his counsel acted deficiently by failing to file a motion to suppress certain incriminating statements he made. But as the district court explained, Mr. Yazzie has not alleged any facts suggesting that counsel's decision was anything other than a reasoned decision based on law and strategy. Indeed, the record shows that Mr. Yazzie had a chance to consult with a second attorney about the potential for a suppression motion and that attorney too concluded there was no legal basis for it. In this light, we see no way in which we might disagree with the district court's assessment that Mr. Yazzie has failed to establish either deficient performance or prejudice, prerequisites both to prove a Sixth Amendment violation.

Separately, Mr. Yazzie contends that his counsel should not have allowed him to enter a plea agreement in which he waived his right to appeal. But he supplies no factual allegations to support this claim other than repeating his allegation that counsel failed him by declining to file a motion to suppress. In this way and as the district court observed, this second claim folds back into the first and fails for the reasons already identified.

The application for COA is denied and this appeal is dismissed.

ENTERED FOR THE COURT

Neil M. Gorsuch
Circuit Judge

APPENDIX G

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

May 16, 2016

Mr. Willis J. Yazzie, Sr.
Prisoner ID 54228-051
FCI
1900 Simler Ave
Big Spring, TX 79720

Re: Willis J. Yazzie, Sr.
v. United States
No. 15-8752

Dear Mr. Yazzie:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

Chris Wolpert
Chief Deputy Clerk

April 13, 2017

Willis J. Yazzie Sr.
FCI - Big Spring
1900 Simler Avenue
Big Spring, TX 79720
54228-051

RE: **17-2044, In re: Yazzie**
Dist/Ag docket: 1:14-CV-00894-JB-CG, 1:10-CR-01761-JB-1

Dear Appellant:

Enclosed please find an order issued today by the court.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker

Elisabeth A. Shumaker
Clerk of the Court

cc: Jacob Alan Wishard

EAS/dd

UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

In re: WILLIS J. YAZZIE, SR.,

Movant.

(D.C. Nos. 1:14-CV-00894-JB-CG &
1:10-CR-01761-JB-1)
(D. N.M.)

ORDER

Before **KELLY**, **HOLMES**, and **MATHESON**, Circuit Judges.

Willis Yazzie was convicted, by guilty plea, on one count of aggravated sexual abuse. After the dismissal of his appeal from the denial of a motion to withdraw his plea, *see United States v. Yazzie*, 572 F. App'x 663 (10th Cir. 2014), he unsuccessfully sought relief under 28 U.S.C. § 2255 on allegations that his counsel was ineffective in failing to seek suppression of incriminating statements he had made, *see United States v. Yazzie*, 633 F. App'x 703 (10th Cir.) (denying a certificate of appealability from denial of § 2255 motion), *cert. denied*, 136 S. Ct. 2029 (2016). He now requests authorization to file a second § 2255 motion on much the same grounds. We deny that request.

To be eligible for authorization, Yazzie must make a prima facie showing that his § 2255 motion relies on either "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense," or "a new rule of constitutional law, made retroactive to cases on collateral review by the

Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h); *see also id.* § 2244(b)(3)(C). Yazzie does not even attempt to make such a showing; indeed, he concedes in his motion for authorization that his claim does not meet either of these prerequisites. Instead, citing precedent predating the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), he attempts to make a showing of "cause and prejudice" to excuse the "procedural default" involved in his presentation of a second or successive § 2255 motion. But "AEDPA's new provisions [governing authorization of second-or-successive motions] wholly and intentionally replace the concept of cause." *Daniels v. United States*, 254 F.3d 1180, 1197 (10th Cir. 2001) (en banc).

The motion for authorization is denied. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

APPENDIX I

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

May 24, 2017

Willis Yazzie
#54228051
FCI, 1900 Simler Ave.
Big Spring, TX 79720

RE: In Re Yazzie
USCA10 No. 17-2044

Dear Mr. Yazzie:

The above-entitled petition for a writ of certiorari was postmarked May 10, 2017 and received May 16, 2017. The papers are returned for the following reason(s):

The denial of authorization by a court of appeals to file a second or successive petition for writ of habeas corpus may not be reviewed on certiorari. See 28 USC Section 2244(b)(3)(E).

Sincerely,
Scott S. Harris, Clerk
By:
Jacob Levitan
(202) 479-3392

Enclosures

APPENDIX J

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District New Mexico
Name *(under which you were convicted)*: Willis John Yazzie Sr.	Docket or Case No.: 14-0894-JB/CEG
Place of Confinement: Federal Correctional Inst. 1900 Simler Ave., Big Spring, TX. 79720	Prisoner No.: 54228051 10cr1761 JB
UNITED STATES OF AMERICA	Movant *(include name under which convicted)*
V. Willis John Yazzie Sr.	

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
United States District Court of New Mexico
333Lomas Blvd.N.W. Suite 270
Albuquerque, NM 87102

(b) Criminal docket or case number (if you know): No.10-1761-JB

2. (a) Date of the judgment of conviction (if you know): _____

(b) Date of sentencing: 3/21/2014

3. Length of sentence: 188 months

4. Nature of crime (all counts):
18 U.S.C. §§§ 1153;2241(c) and 2246(2)(C)
18 U.S.C. §§§ 1153;2241(c) and 2246(2)(D)

5. (a) What was your plea? (Check one)
(1) Not guilty ☐ (2) Guilty ☒ (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to?
Plead Guilty to 18 U.S.C. §§§ 1153,2241(a) and 2246(2)(C)
Not Guilty to 18 U.S.C. §§§ 1153;2241(c) and 2246(2)(D)

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☐

8. Did you appeal from the judgment of conviction? Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: United States Court of Appeals for the 10th Cir.

(b) Docket or case number (if you know): 14-2043

(c) Result: Grant the government's motion to enforce the appealent waiver

(d) Date of result (if you know): 7/23/2014

(e) Citation to the case (if you know): _____

(f) Grounds raised:
Denial of my Motion to Withdraw Guilty Plea.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: United States District Court of New Mexico

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): 2/5/2015

(4) Nature of the proceeding: _____

(5) Grounds raised: Ineffective assistance of counsel

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☒

(7) Result: Denied

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket of case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☒ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Prosecution Misconduct by the United States Attorney and the District Court.Ineffective assistance of counsel.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The district court erred by summarily dismissing prtitioner's § 2255 motion without making, findings of fact and conclusions of law.

Therefore, petitioner direct the district court to:(1) orded the United States Attorney to conduct the customary legal formalities to petitioner's § 2255 motion issues, by demonstrating on the merit that petitioner did not received ineffective assistance of counsel, on petitioner's Fourth Amendnent.

At Civil Mo. 14-0894-JB/CEG,Doc. 19 at 6: "The strong inference is that Mr. Loonam considered that issue (and others) and chose not to file a motion because in his professional Judgment no meritorious suppression issues existed."Petitioner had provided a case law that there is a meritorious Fourth Amendment issues. The United States Attorney did not prove otherwise.

The magistrate and ditrict judges erred by agreeing with the United States Attorneyand the defense attorneys.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

Unreasonable

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☒ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: 28 U.S.C. § 2255

Name and location of the court where the motion or petition was filed:

United States District Court of New Mexico

Docket or case number (if you know):

Date of the court's decision: 10/31/2015

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☒ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

_____

GROUND THREE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

_____

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the you are challenging:

(a) At the preliminary hearing:

James C. Loonam

(b) At the arraignment and plea:

James C. Loonam

(c) At the trial:

(d) At sentencing:

Kimberly Middlebrooks

(e) On appeal:

Todd B. Hotchkiss

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes [ ] No [X]

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes [ ] No [X]

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes [ ] No [X]

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

Ineffective assistance of counsel for not suppressing petitioner statement that was made to theFBI.

or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on 2/27/2018 (month, date, year).

Executed (signed) on 2/27/2018 (date)

Willis John Yazzie Sr

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

Willis John Yazzie Sr. #54228051
Federal Correctional Institution
1900 Simler Ave.
Big Spring, TX 79720

MIDLAND TX 797
FEB 2018

RECEIVED
At Albuquerque NM
MAR 01 2018
MATTHEW J. DYKMAN
CLERK

⇔54228-051⇔
United States
District Court 10th Cir
333 Lomas BLVD NW
Albuquerque, NM 87102
United States

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

YAZZIE, Petitioner, v. UNITED STATES of America, Respondent.	)	Civil No. 14-0894-JB/CEG Criminal No. 10-1761-JB

MEMORANDUM IN SUPPORT TO A MOTION PURSUANT TO 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT A SENTENCE BY A PERSON IN FEDERAL CUSTODY

Pursuant to 28 U.S.C. § 2255, petitioner has filed a § 2255 motion with this court starting on 10/3/2014 and 2/10/2015 to 10/31/2015. CR Doc. 195, 201, and 215.

Petitioner is going to demonstrate that he was not denied on the merit for his first § 2255 motion and for that reason this is not a second or successive § 2255 motion. As demonstrated below, Petitioner Yazzie's motion should be granted for an Evidentiary Hearing.

STATEMENT OF THE FACTS

Procedural Facts:

1. (CR Doc. 0) Arrest of Willis Yazzie on 5/11/2010.
2. (CR Doc.1) Complaint as to Willis Yazzie on 5/12/2010 at the Initial Appearance.
3. (CR Doc. 7,8,9,and 10) Preliminary/Detention Hearing on 5/13/2010, before Magistrate Judge W. Daniel Schneider and Petitioner Yazzie waives hearing by the advice of counsel.
4. (CR Doc. 25) Motion (Letter) for new attorney by Willis Yazzie on 11/12/2010.
5. (CR Doc. 26) Motion (second) to Withdraw Attorney James Loonam by Willis Yazzie on 11/15/2010.

6. (CR Doc. 30) MEMORANDUM OPINION AND ORDER by District Judge James O. Browning: denying 26 MOTION to Withdraw as Attorney 25 MOTION to substitute Attorney on 2/17/2010.

7. (CR Doc 35-39) Plea Hearing held before Chief Magistrate Judge Richard L. Pulisi, petitioner pled guilty to Information on 2/9/2011.

8. (CR Doc. 54) MEMORAMDUM OPINION AND ORDER by District Judge James O. Browning: granting 51 MOTION to Determine counsel. Attorney James C. Loonam terminated in case as to Willis Yazzie on 10/6/2011.

9. (CR Doc.59) MOTION to Withdraw Plea of Guilty by Willis Yazzie on 11/29/2011.

10. (CR Doc.64) MOTION to Withdraw Plea of Guilty by Willis Yazzie on 4/4/2012.

11. (CR Doc.84) Unopposed MOTION for Psychiatric/Psychological Exam by Willis Yazzie. (Middlebrook, Kimberly) on 10/15/2012.

12. (CR Doc. 93) ORDER by District Judge James O. Browning finding defendant competent on 2/7/2013.

13. (CR Doc.100) MEMORANDUM OPINION AND ORDER by District Judge James O. Browning denying 59 MOTION to Withdraw Plea of Guilty on 6/4/2013.

14. (CR Doc.114) SUPPLEMENT to 13 letter/MOTION for Reconsideration by Willis Yazzie on 8/13/2013.

15. (CR Doc. 121)ADDENDUM re 113 Letter/Motion for reconsideration of Withdrawal of Plea by Willis Yazzie on 10/29/2013.

16. (CR Doc.130) MEMORANDUM OPINION AND ORDER by District Judge James O. Browning denying 64 MOTION to Withdraw Plea of Guilty, granting in part and denying in part 113 letter 59 and denying MOTION to Withdraw Plea of Guilty as to Willis Yazzie on 2/6/2014.

17. (CR Doc. 135-38; and 156-57) SENTENCE IMPOSED: CBOP: 188 months on 3/21/2014.

18. (CR Doc.158) JUDGMENT by District Judge James O.Browning as to Defendant Willis Yazzie on 5/8/2014.

19. (CR Doc.195) MOTION to Vacate Under 28 U.S.C. § 2255 by Willis Yazzie, (Civil Case No. 14-894-JB/CG) on 10/3/2014.

20. (CR Doc. 198) MOTION to Dismiss Defendant's Motion to Vacate, Set Aside by U.S.A. as to Willis Yazzie on 10/28/2014.

21.(CR Doc.200) ORDER denying 198 Motion to Dismiss and to cure Deficiency by Magitrate Judge Carmen E. Garza. Defendant shall cure the deficiencies designated in this Order by March 2, 15 the clerk is directed to mail to defendant together with a copy of this Order, a form § 2255 motion with instructions. On 1/29/2015

22.(CR Doc. 211)(CV Doc. 19) UNITED STATES RESPONSE TO A MOTION PURSUANT TO 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT A SENTENCE BY A PERSON IN FEDERAL CUSTODY

The United States respectfully request that this court deny defendant's 28 U.S.C. § 2255 motion because defendant has presented no meritorious claim entitling him to relief.On 5/29/15.

23.(CR Doc.214)(CV Doc.21) PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

Respondent contends that Mr. Loonam considered suppression issues, had determind that there were no meritorious grounds for suppressing petitioner's statements, and therefore did not file a motion to suppress.

Recommendation: for the reason discussed above, the court finds that petitioner has filed to allege that he was dinied effective assistance of counsel in violation of his Sixth Amendment rights based on Mr. Loonam's failure to file a motion to suppress his incriminating statements.Because the motion, files and records conclusively show that petitioner is not entitle to any rlief the court will not hold a hearing in this case. therefore, the court RECOMMENDS that Petitioner Willis Yazzie's § 2255 Motion, be DISMISSED WITH PREJUDICE.

24.(CV Doc.22) AFFIDAVIT by Willis J. Yazzie. Date filed 8/3/15.

25.(CR Doc.215)(CV Doc.23) MEMORANDOM OPINION AND ORDER ADOPTING THE MAGISTRATE JUDGE'S PROPOSED FINDING AND RECOMMENDED DISPOTITION

ANALYSIS

Yazzie has provided facts challenging the lawfulness of his initial arrest to again suggest that his confession was Unconstitutionally obtained and that Mr. Loonam's legal advice was incorrect. See Objections at 2. These facts do not, however, demonstrate that Mr. Loonam's failure to file a motion to suppress his confession was an error so serious that Mr. Loonam was not functioning as the "counsel" guaranteed Yazzie. Furthermore Yazzie had been provided an opportunity to discuss the suppression issue with a second attorney who agreed with Mr. Loonam that pursuing those claims was not in Yazzie's best interest.

As a result, the court concludes that Yazzie has not met his burden to show that his counsel's performance was deficient because it fell below an objective standard of reasonableness.

In conclusion, Yazzie has not pointed out any factual or legal errors in Judge Garza's analysis of the petitioner's

claims.(On 10/31/2015).

26.(CR Doc. 216) NOTICE OF APPEAL by Willis Yazzie on 11/9/2015.

27.(CR Doc. 223) ORDER OF USCA as to Willis Yazzie. Final Judgement on 2/4/2016.

28.(CR Doc. 225) PETITION FOR WRIT OF CERTIORARI filed in the Supreme Court of the United States as No. 15-8752on 3/31/2016.

29.On May 16, 2016 the Supreme Court of the United States denied writ of certiorari as to Willis J. Yazzie Sr..

30.(CV Doc.39) On 4/13/2017 the court of appeals denied the request authorization to file a second § 2255 motion.

Substantive facts:

1. On May 10, 2010 the Shiprock Navajo Trible Detention Officer put restrants on petitioner and then came an FBI Agent Named Dustin Grant along with the Navajo Nation Police (BIA) S.I. Louis St. Germaine and took petitioner. Petitioner Yazzie was pick up from Shiprock Trible Jail and transported to the (BIA) Navajo Nation Police Station about 4to5 miles away. At the BIA Police Station petitioner waived his Miranda rights and was compel to confess to the allege sexual offense.

2. On May 11, 2010 Petitioner Yazzie was pick up around noon from Shiprock Trible Jail by FBI Agent Dustin Grant and was transported to Framington N.M. detention Center, where petitioner stayed a night. The next day on May 12, 2010, Agent Dustin pick up petitioner and transported him to Albuquerque, N.M. United States District Court, where a Criminal Complain was filed (CR Doc. 1) by the United States Attorney for probable cause arrest of petitioner and Attorney James C. Loonam was appointed to represent petitioner at the Initial Appearance before Magistrate Judge W. Daniel Schneider. (CR Doc. 1).

3. When petitioner was place at Regional Correctional Center (RCC) in Albuquerque N.M. an inmate named Gerald Begay told petitioner that he can have his statement suppress and from that advice petitioner ask his Attorney James to have his statement suppresss, when he came to visit him at RCC. The attorney told petitioner that his statement cannot be suppress because petitioner waive his rights under Miranda.When petitioner got back to his unit he told Gerald what the attorney had said and Gerald said the attorney was incorrect because his statement got suppress. Gerald then told petitioner to fire his attorney because the attorney would not ask the court to have petitioner's statement suppress. Petitioner then sent a letter to the court askung to have his attorney dismiss from the case because the attorney will not get petitioner's statement suppress. (CR Doc.25). Petitioner was told by another inmate that he has to send a motion not a letter, so petitioner sent a motion to dismiss attorney. (CR Doc.26).

4. When the attorney learn about the motion he came to RCC to visit petitioner about the motion and that is when the attorney told the petitioner that statement cannot be suppress because there is evidence of JD2'S Sexual Transmitted Disease (STD) and the goverment will use it to prove that you gave it to her, because petitioner had it back in 2008. Petitioner told his attorney that he never did anything to JD2 and the attorney told petitioner that, with the STD evidence the jury would believe that you gave it to her because you had it before, petitioner than told his attorney that the STD he had was back in 2008 and did not have it now. The attorney said to petitioner that all the government had to say is that petitioner gave it to JD2 back in 2008 and not know about it until now in 2010. The attorney told petitioner with the STD evidence the government will find you guilty and get 30 years to life. Petitioner also told his attorney that he did not penetrate JD1 and the attorney told petitioner that he confess that he did penetrate JD1. Petitioner said that is why I want to suppress my statement but the attorney said petitioner cannot suppress his statement because he waived his rights under Miranda rights. Attorney convince petitioner that his statement cannot be suppress.

5. The court held a hearing on the above issue (CR Doc.25 and 26) on 12/16/2010. At the hearing petitioner had no objection to the court denying his motion. The court said"it does not appear that a motion to suppress is warranted at this time, Pre-trial negotiation between Yazzie and the United States are ongoing and a motion to suppress may not be necessary at this time. In any case, the issue of a possible motion to suppress does not warrant replacing Mr. Loonam."(CR Doc. 30).

6. The attorney then met with petitioner at RCC to tell him that he got a Plea Agreement for 15 to 20 years.Petitioner read the Plea Agreement and told his attorney that he did not penetrate JD1 or usd force on her. Petitioner said to his attorney that 15 to 20 years was to much for something he did not do, petitioner told his attorney the only way he will take the Plea is if the time is lower then 15 to 20 years and have the girls reinvestigated because he did not penetrate JD1 or give STD to JD2. Days later the attorney came back with a Plea Agreement from the government for 15 to 19 years and statement for the government to reinvestigate the girls. Still petitioner did not want to take the Plea Agreement because 15 to 19 years was sill to much and that he did not penetrate JD1 or give STD to JD2. The attorney said that is the best he can do and the government will not go any lower.

7. On 2/9/2011 petitioner ended up taking the Plea Agreement for 15 to 19 years, from the adivice of his attorney. When petitioner was signing the Plea Agreement he use letters like this ( ), thinking that the court would not accept the Plea Agreement, because petitioner did not want to take the Plea Agreement by not signing his original signature in the Plea Agreement Petitioner forgot all about this untill now. (CR Doc. 35-39).

8. After petitioner receive his PSR he started studying the law of how to withdraw his Plea of Guilty. Petitioner was not successful in all his argument but had faith that there was merit under the 4th Amendment by proving that his attorney was ineffective to not have his statement suppress under the 4th Amendment, because of the illegal arrest. Petitioner learn that there was no probable cause from studying case laws.FBI Agent Dustin's Affidavit says that petitioner was arrested on probable cause and this is where petitioner started studying the law on probable cause, from this petitioner ask the court to witdhdraw his Plea of Guilty on this days: 11/29/2011 and 4/4/2012.(CR Doc. 59 and 64).

9. On 6/4/2013 the district Court denied Petitioner Yazzie's to withdraw his Plea of Guilty. (CR Doc.100).

10. On 10/29/2013 Petitioner ask the court for Reconsideration to Withdraw Plea of Guilty. (CR Doc. 121).

11. On 2/6/2014 the District Court denied motion for Reconsideration to Withdraw Plea of Guilty. (CR Doc. 130).

12. On 10/3/2014 petitioner put in a § 2255 Motion that was hand written by him, when he was at USP Florence,Co..

13. On 1/29/2015 Order denying 198 Motion to Dismiss and to Cure Deficiency by Magistrate Judge Carmen E. Garza. Detendant shall cure the dificiencies designated in this Order, a form § 2255 motion with instruction. (CR Doc. 200).

14. On 2/11/2015 The Amended motion to vacate under 28 U.S.C. § 2255 by Willis Yazzie.

15. On 5/29/2015 the United States respectfully request that the court deny Defendant Yazzie's § 2255 motion because defendant has presented no meritorious claims entitling him to relief..

16. On July 22, 2015 Proposed Findings and recommended Disposition by the Honorable Carmen E. Garza United States Magistrate Judge. The court finds the Recommendetion that the Petitioner Yazzie has failed to allege that he was denied effective assistance of counsel in violation of his Sixth Amendment rights based on Mr. Loonam's failure to file a motion to suppress his his inciminating statements. Because the motion, files, and records conclusively show that petitioner is not entitled to any rlief, the court will not hold a hearing in this case.See 28 U.S.C. §2255 (b). Therefore the court recommends that Petitioner Yazzie's Motion be DISMISSED WITH PREJUDICE. The court further recommendeds that a certificate of appellability be DINIED.

17. On August 3, 2015 Petitioner Yazzie filed as Affidavit ("Objection"). Petitioner's objections to Judge Garza's findings. In petitioner's objections, Yazzie provides additional facts

surrounding his conversation with Mr.Loonam regarding filing a motion to suppress in his case. Yazzie suggest that these facts indicate Mr. Loonam's performance was deficient, Tazzie also states that Mr. Loonam told Yazzie's brother to tell petitioner to take the plea offered to him. Finally, Yazzie describes his detention by the Trible and Federal law enforcement on May 10, 2010, and his subsequent confession.

18. On October 31, 2015 Memorandum Opinion and Order Adopting the Magistrate Judge's Proposed finding and Recommended Disposition was filed.
In conclusion Yazzie has not pointed out any factual or legal errors in Judge Garza's analysis of the petition's claims. The court will therefore overrule Yazzie's objections, the court concludes that Judge Garza concluded the proper analysis and correctly that the court should dismiss Yazzie's claims with prejudice. The court dismissed the petition with prejudice.

19. On February 4, 2016 the United States Court of Appeal for the Tenth Circuit denied COA and the appeal was dismissed.(CR Doc. 223).

20. On 3/31/2016 PETITION FOR WRIT OF CERTIORARI was filed in the United States Supreme Court as No. 15-8752 and dismessed the case on May 16, 2016.

21. On 7/11/2016 petitioner put in for a Motion for Discovery and Inspection (CV Doc. 35).

22. ORDER denying Motion for discovery and Inspection by Magistrate Judge Carmen E. Garza on 7/29/2016. The United States District Court denied Motion for Discovery and Inspection of all written or recorded statements made by defendant and the substance of all oral statements which the prosecution intends to offer in evidence made by the defendant to the FBI Agent Dustin Grant on May 10, 2010.
However the court said: "The issue here is not whether petitioner was actually illigal arrested but rather whether he received ineffictive assistance of counsel". (CV Doc.36).

23. On 8/15/2016 petitioner put in for a Motion for reconsideration for Denying Motion for discovery. (CV Doc. 37).

24. ORDER denying [37] Motion for Reconsideration by Magistrate Judge Carmen E. Garza on 11/30/2016. "Petitioner has consistently pursued the theory that his arrest was illegal, therefore his confession was [the] fruit of the poisonous tree, and his trial counsel should have suppressed his confession on those grounds. (See CV Doc.1;9;and 23). If petitioner wishes to argue that his guilty plea should be withdrawn because his confession was coerced, petitioner should do so in a new § 2255 motion".

Finally, petitioner states that he does not understand what the court means, when it says he must demostrate ineffective assistance of counsel. (CV Doc. 37 at 2)."Petitioner appears to argue that if he shows he was unconstitutionally arrested or that his confession was compelled, the court should automatically find that he was denied effective assistance of counsel because his trial counsel did not try to suppress his confession. (CV Doc.37 at 2).

"Even assuming for the sake of argument that petitioner's trial counsel was "completely unreasonable" for not attempting to suppress petitioner's coerced confession, petitioner must still show that but for his counsel's ineffective assistance, petitioner would have insisted on going to trial instead of accepting a plea as the court noted in the PFRD, petitioner probably would not have gone to trial given the factual circumstances in this case. (See Doc. 21 at 10-11). Further petitioner has not alleged any facts suggesting he would have gone to trial if counsel attempted to suppress petitioner's confession. Thus, even if the court granted petitioner's Motion and petitioner were able to prove his counsel was unreasonably deficient, petitioner has still not satisfied both prongs necessary to establish ineffective assistance of counsel."

111 Conclusion

For the foregoing reasons, petitioner has not established grounds warranting reconsideration of the Court's Order Denying Motion for Discovery, (CV Doc.36). IT IS THEREFORE ORDERED that petitioner's Motion for reconsideration for Denying Motion for Discovery, (CV Doc. 37) is DENIED.

ARGUMENTS

Petitioner Yazzie is going to satisfy that he can reassert a claim from a previous § 2255 Motion that was denied with prejudice because petitioner did not show the existence of ineffective assistance of counsel. The District Court never reach the merit of the 4th Amendment and 6th Amendment violation to satisfy the end of justice. The court just said that petitioner did not demonstrate ineffective assistance of counsel and that is not on the merit.

In Ramon **Haro-Arteaga v. United States,199 F.3d 1195,1196,** the court said: "In upholding the gatekeeping function of the courts of appeals set forth in AEDPA, the Supreme Court noted that, as to similar restrictions on § 2254 petitions, "the new restrictions on successive petitions constitute a

moditied res judicata rule, a restraint on what is called in habeas practice 'abuse of the writ.'" Felker v. Turpin, 518 US 651, 664, 135 L.Ed 2d 827, 116 S. Ct. 2333 (1996). In Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S. Ct 1618, 140 L.Ed.2d 849 (1998), the Court was presented with the issue of whether a § 2254 petition was successive where the only claim being presented had been dismissed asprematura and unripe in a prior § 2254 petition, although the rest of the earlier petition had been resolved on the merits. The Court held that the second petition was not second or successive for purposes of AEDPA. Part of the Court's rationale was that those claims "would not be barred under ... any form of res judicata." 118 S. Ct. at 1622.

In Stewart v. Martinez-Villareal,523 U.S. 637, 643-45, the Court said:

"This may have been the second time that respondent had asked the federal court to provede relief on his Ford claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244 (b). there was only one application for habeas relief, and the District Court ruled (or should had ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.

...We believe that respondent's Ford claims here-previously dismissed as premature-should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies. True, the cases are not identical; respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies,but because his execution was not imminent and therefore his competency to be executed could not be determined at that time. But in both situations , the habeas petitioner does not receive an adjudication of his claim."

In petitioner's case the District Court did not reach the merit or prove that there was no merit in the 4th and 6th Amendments. What the District Court did was agree with two attorneys that petitioner statement cannot be suppress. See CV Doc. 19 at C. Fourth Amendment Claims. The attorneys did not demonstrate with evidence that there was no merit to suppress petitioner's statement. Petitioner is going to demostrate that there is merit in his case. The files and records of the case alone does not show evidence that there no merit to suppress petitioner's statement.

PETITIONER'S CAUSE

Why I cause my first § 2255 Motion to be denied is because I did not know how to litigate my argument about the ineffective assistance of counsel. When the government respond back to my § 2255 Motion I did not have knowledge to litigate to respond back.

I did not study how to litigate, to file and demonstrate ineffective assistance of counsel, because I could not ask anyone to help me with my case because of the sex offense charge I have.

The court can see that I did not know how to file a § 2255 Motion because the court told me to cure it because I did not use the § 2255 form and when I did fill out the form I did not sent it with a Memorandum. If I had study how to fill out the form and to litigate it, I would of done it as I did this § 2255 Motion.

I had to do alot of research to do this § 2255 Motion and now I am asking this court to grant this case because of the cause I demonstrated that I have no knowledge in the law.

PETITIONER'S PREJUDICE

Because of the cause I cause prejudice to my case because I would had been out of prison during this time. The prejudice I cause myself not to prove ineffective assistansce of counsel and if I had prove ineffective assistance of counsel the court would had withdraw my Plea Agreement and went to trial or get another Plea Agreement for sexual contact. The prejudice that I cause to my § 2255 Motion, cause me not to prove that I was innocent of the sexual act. Now I am asking this court to give me another chance.

For the above reason petitioner is going to reassert a claim from

a previous 28 U.S.C. § 2255 that was denied because petitioner did not deminstrate ineffective assistance of counsel. The merit was not reached by the court when petitioner enter the Plea Agreement and when the $ 2255 Motion was denied.

COUNSEL'S PREFORMANCE

In United States v. Mercedes-De-La Cruz,477 F.3d 61,67 the court said:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction...has two components. "Strickland v. Washington, 466 U.S. 668, 687,104 S. Ct. 2052,80 L. Ed.2d 674 (1984). First. the defendant must show that counsel's performance was objectively unreasonable "under previling professional norms, "Id.at 688. In making this assessment, court must be "highly deferential"and "indulge a strong presumption that... under thee circumstances, the challenged action might be considered sound trial strategy. "Id. at 689 (internal quotation marks omitted); accord Woods v. Donald, 135 S.Ct.1372,1375,191 L. Ed.2d 464 (2015)(pre curiam). Second, the defendant must show that counsel's deficient performance resulted on in prejudice--that is, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland,466 U.S. at 6943; accord Woods, 135 S.Ct. at 1375. In ths specific context, where the alleged ineffectiveness was the failure to file a motion to suppress, in order to show prejudice the defendant must "prove that his Fourth Amsndment claim is meritorous"and that therer is a reasonable that the verdict would have been different had the challenged evidence been excluded. Limmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)."

Petitionrer is going to demonstrate that his attorney was ineffective at the time he did not have petitioner's statement suppress. See CR Doc. 25 and 26 where petitioner ask the court two times to have his counsel dismiss from thee case because the attorney would not have petitioner's statement suppress.

The attorney's advice to petitioner that his statement cannot be suppress and that the government will use JD2'S STD evidence to convict him, was unreasonable because the attorney did not in-

vestigate petitioner's statement if it was obtain in any violation of the United States Constitution.

A competent attorney in the law would had investigated how petitioner's statement was obtain by the attorney asking petitioner if he voluntarily went to the police station and petitioner would had told the attorney that a FBI Agent Named Dustin Grant and with a BIA Navajo Nation Police Named Louis St. Germaine had pick him up from Shiprock Trible Jail and then transported him to the BIA Navajo Nation Police Station. From this statement by petitioner the attorney would had investigated the recorded DVD confession and the FBI Agent's Affidavit to see if there was probable cause to take petitioner from Shiprock Trible Jail and transport him to the BIA Police Station. The attorney would had known that taking a person is an arrest. See **Dunaway v. New York**, 442 U.S. 200, 203 It was held that the police violated the Fourth Amendment, where the police without probable cause to arrest, they took the individual into custody and transported him to the police station and detained him there for interrogation. The defendant give incriminating statement to the police during the illegal detention and it was inadmissible even when the Miranda Warning are given.

For this reason the attorney would had ask the court to have petitioner's statement suppress for the violation of his Fourth Amendment, because the attorney had learn all of this by investigationg petitioner's recorded DVD confession and the FBI Agent Dustin Grant's Affidavit that there was no probable cause to take petitioner from Shiprock Trible Jail and have him transported to the BIA Police Station.

The Attorney James Loonam's action was unreasonable for giving the advice to petitioner that his statement cannot be suppress without investigating how to suppress petitioner's statement.

Attorney James was also ineffective for saying that the government will prove taht petitioner gave the STD to JD2 because petitioner had it in 2008 that was shown with the medical record. A competint attorney will know that the government cannot say that petitioner gave the STD to JD2 back in 2008 and had it up to 2010 because JD2 said that petitioner started touching her in the year 2010 and not in 2008. A competent attorney would had also ask petitioner if he had the STD now and how he knows. Petitioner would had said he knows because when he had it back in 2008 he had this experience of burning sensation while urinating and that is how he knows he knows he don't have it now.The competent attorney would had investigated JD2 if she ever experience burning sensation while urinating back in 2008 to 2010. By the investigating the attorney would had learn that JD2 never experience any burning sensation while urinating from 2008 to 2010. JD2 had to get the STD around the time she blame petitioner was doing things to her,but this was not true because petitiioner never had STD in in 2010.

JD1'S statement to the police could not prove that petitioner had penetrated her because she never did say that petitioner put his finger inside her and that it hurt. Where is the evidence that petitioner pentrated JD1 without petitioner's statement to the FBI. A competent attorney would had petitioner's statement suppress to dismiss the sexual act charge of penetration and for the

government to prove that there was penetration by petitioner without the statement he made to the FBI.

For the above reason the government would had not proven that petitioner penetrated JD1 with the hearsay statement she made to the FBI. JD2'S STD evidence would had not proven that she got it from petitioner because it was impssible.Petitioner did not have STD in 2010.

This was not the outcome of the case because the attorney did not investigate petitioner's case more fully to learn that the statement petitioner made to the FBI would have been suppressed. And that JD2'S STD could not be use by the government if the attorney had investigated the case.

The outcome of petitioner's case would had been different for petitioner, if the court had apointed him an compentent attorney to defend him by having petitioner's statement suppress and heard outside the presence of the jury and the making of the motion cannot bring harm to the petitioner, but can only help him. Any attorney with ordinary competence in th criminal law would make such a motion in this situation. Therefore, the failure to make such a motion constituted ineffective assistance on counsel.

More to the point, if counsel had attempted to suppress the statement, the attorney would had succeeded using the case law **Dunaway v. New York**. In this case petitioner would had went to trial without the evidence of his confession or the government would had to offered a Plea Agreement without the sexual act that petitioner was charge with and to get a plea for sexual contact.

Petitioner was denied the effective assistance of counsel when petitioner had asked the court two times to have his counsel

dismiss from the case because the attorney would not file a motion to suppress petitioner's statement.See CR Doc. 25 and 26. The court held a hearing on 12/16/2010 of the above issues that was denied to replace Attorney James Loonam. At the hearing petitioner had no objection to the court denying his motion because the attorney convince petitioner that his statement cannot be suppress.

At paragraph 6 to 7 of Substantive facts the attorney was ineffective for having petitioner enter the Plea Agreement for a sexual act that carried a 15 to 19 years sentence.

As demonstrated above that the statement would had been suppress with a competent attorney and for that reason petitioner would had never enter a Plea Agreement for sexual act because there would had been no evidence of sexual act for JD2 and JD1. Petitioner would had went to trisl or the government would had to give petitioner a Plea Agreement for sexual contact and not a sexual act. This was not the case because the attorney was ineffective for not having petitioner statement suppress.

For the above reason petitioner is asking the court to withdraw his Plea Agreement because of ineffective assistance of James Loonam for giving the wrong advice that petitioner cannot have his statement suppress and for that reason the attorney convince petitioner to enter the Plea Agreement. Petitioner proved that there is merit to suppress his statement and for that reason he can withdraw his Plea Agreenent for the ineffective assistance of counsel of James Loonam that is demonstrated above.

COUNSEL'S PREJUDICE

The attorney cause prejudice to petitioner's case because petitioner enter a harsh Plea Agreenent by the advice of his counsel that petitioner's statement cannot be suppress. For that reason petitioner got a harsh sentence and lost the oppertunity to cross-exaime JD1 and JD2 to see if the allegation were true as the victimes had said in there hearsay statenent in the FBI Agent Dustin Grant's Affidavit.

When the attorney said to petitioner that his statement cannot be suppress and had petitioner Plead Guilty to JD1 for sexual act and to have JD2 dismiss from the case. The attorney's unprofessional action cause prejudice to petitioner's case because he did not suppress petitioner's statement that cause petitioner to enter a sexual act offense Plea Agreement for JD1. Petitioner lost the oppertunity to get a sexual contact sex offense for JD1 by using her hearsay statement at trial or for a Plea Agreement. JD1'S hearsay statement does not state that she was penetrated by petitioner and if JD1 had went to trial for cross-exaimination about her pass statement she made about the alleged sexual contact would of not gave petitioner a sexual act offense with JD1'S statement at trial.

JD2 would of been a different issue if she was cross-examined on the STD evidence and if her hearsay statement was used the government would had to prove that petitioner gave her the STD and that would been impossible for the government to prove, when JD2 said the alleged sexual offense started in 2010 and she did not say it happen or started in 2008 at the time petitioner had

the STD. At teial an expert witness on sexual offense for STD would had been called for by an competent attorney.

For the above reason the Attorney James Loonam cause prejudice for not suppressing petitioner's statement by having petitioner enter a Plea Agreenent for sexual act offense for JD1 and lost the oppertunity to see where JD2 got the STD and when proved that petitioner did not give her the STD the government would had investigated JD2 of how or where she got the STD.

The outcome would had been different if the statement made by petitioner was suppress and for the attorney not to have it suppress cause prejudice to petitioner's case. Petitioner would had been found guilty of sexual contact for JD1 and the government would had to use 18 U.S.C. §2244(a)(1) and not use 18 U.S.C. § 2241(c). Petitioner would had been sentence using Guidelines § 2A3.4(a)(1),(b)(2),and (b)(3). The base offense level would had been 24 which is 51 to 63 months imprisonment and if there was a Plea Agreement by the government the base offense level would had been decress by 3 levels and that would had put petitioner at level 21 which is 37 to 46 months imprisonment.

CONCLUSION

Petitioner has proved that there is merit to have his statment suppress and ineffective assistance of counsel for not having petitioner's statement suppress. For the above reason petitioner's Plea Agreement should be withdrawn.

Petitioner as pro se daclare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and I am the person named above.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

No. CR 10-1761 JB
No. CIV 18-0206 JB/GBW

WILLIS J. YAZZIE,

Defendant/Movant.

MEMORANDUM OPINION AND ORDER OF DISMISSAL

THIS MATTER comes before the Court on the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed March 1, 2018 (Doc. 231)("Motion"). The Court dismisses the Motion as a second or successive motion under 28 U.S.C. § 2255 that Defendant/Movant Willis J. Yazzie filed without the United States Court of Appeals for the Tenth Circuit's authorization.

FACTUAL AND PROCEDURAL BACKGROUND

Yazzie pled guilty and was sentenced to 188 months of imprisonment for aggravated sexual abuse in Indian Country in violation of 18 U.S.C. § 1153. See Plea Agreement, filed February 9, 2011 (Doc. 38); Judgment in a Criminal Case, filed May 8, 2014 (Doc. 158)("Judgment"). Yazzie filed his first, handwritten, motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 on October 3, 2014. See Motion to Vacate Under 28 U.S.C. 2255, filed October 3, 2014 (Doc. 195)("First Motion"). In his First Motion, Yazzie sought to have his sentence set aside on the grounds of ineffective assistance of counsel. See First Motion at 1-2. The Court entered a Memorandum Opinion and Order Adopting the Magistrate Judge's Proposed Findings and

Recommended Disposition, filed October 31, 2015 (Doc. 215)("MOO"), adopting the Magistrate Judge's Proposed Findings and Recommended Disposition and dismissing Yazzie's First Motion on October 31, 2015. See MOO at 9. In its MOO, the Court concluded that Yazzie had failed to show that he received ineffective assistance of counsel during his criminal trial and denied Yazzie a certificate of appealability. See MOO at 4, 7-9. Yazzie then sought a certificate of appealability from the Tenth Circuit. See Notice of Appeal, filed November 9, 2015 (Doc. 216). The Tenth Circuit denied a certificate of appealability, determining that the Court was correct in concluding that Yazzie had failed to demonstrate ineffective assistance of counsel. See Order Denying Certificate of Appealability, filed February 4, 2016 (Doc. 223).

In his Motion, Yazzie contends that the Court should not have "summarily" rejected his ineffective assistance of counsel argument and seeks to raise the same grounds for a second time. See Motion at 4.

THE LAW GOVERNING SECOND OR SUCCESSIVE § 2255 MOTIONS

The statutes governing federal habeas corpus proceedings provide:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

28 U.S.C. § 2241(a).

Section 2255 states that, in accordance with § 2244, a Court of Appeals panel must certify a second or successive motion to contain: (i) newly discovered evidence that would be sufficient to establish by clear-and-convincing evidence that no reasonable factfinder would have found the

movant guilty of the offense; or (ii) a new rule of constitutional law that was previously unavailable and was made retroactive to cases on the Supreme Court of the United States' collateral review. See 28 U.S.C. § 2255(h). Section 2244 requires that, before the movant files a second or successive application in the district court, the applicant shall move the appropriate Court of Appeals for an order authorizing the district court to consider the application. See 28 U.S.C. § 2244(b)(3).

A district court lacks jurisdiction to consider a second or successive motion absent the requisite authorization. When a movant files a second or successive § 2255 motion in the district court without a Court of Appeals' required authorization, the district court may dismiss or may transfer the matter to the Court of Appeals under 28 U.S.C. § 1631 if it determines that it is in the interest of justice to transfer. See In re Cline, 531 F.3d 1249, 1252 (10th Cir. 2008).

ANALYSIS

Yazzie filed his First Motion arguing ineffective assistance of counsel. See First Motion at 1-2. The Court dismissed the First Motion on the merits. See MOO at 9. Despite the Tenth Circuit's agreement with the Court's dismissal, Yazzie seeks to reargue the ineffective assistance issue for a second time. See First Motion at 1, Motion at 2. Yazzie contends that the Court should not have "summarily" dismissed his First Motion, and the Court should permit him to obtain discovery and have a hearing on his ineffective assistance of counsel claim. See Motion at 4.

Yazzie's Motion does not present any newly discovered evidence or raise a new rule of constitutional law. See Brumark Corp. v. Samson Res. Corp., 57 F.3d 941, 948 (10th Cir. 1995). Instead, Yazzie seeks to reargue the same issue that the First Motion presents. Yazzie has not

obtained and likely could not obtain Tenth Circuit authorization to proceed under § 2255 on an issue that he has already raised and that two federal courts have adjudicated against Yazzie. See 28 U.S.C. §§ 2244(b)(3), 2255(h). Yazzie's Motion is a second or successive § 2255 motion that he filed without the requisite authorization.

Yazzie has filed his Motion without authorization from a Court of Appeals as § 2244(b)(3)(A) requires. The Court lacks jurisdiction to consider his Motion absent the requisite authorization. When a movant files a second or successive § 2255 motion in the district court without a Court of Appeals' required authorization, the district court may dismiss or may transfer the matter to the court of appeals if it determines, under 28 U.S.C. § 1631, that it is in the interest of justice to transfer. See In re Cline, 531 F.3d at 1252. Because Yazzie has already made his ineffective assistance of counsel argument, and the Tenth Circuit has approved the Court's determination that his argument is insufficient to obtain § 2255 relief, the Court concludes that it is not in the interest of justice to transfer this matter to the Tenth Circuit. The Court will dismiss his Motion based on lack of jurisdiction.

IT IS ORDERED that: (i) the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed March 1, 2018 (Doc. 231), is dismissed without prejudice; and (ii) the Motion Pursuant to 18 U.S.C. § 3143(b) Release Pending Appeal by Petitioner, filed August 6, 2018 (Doc. 235), and the Motion for Discovery, filed November 29, 2018 (Doc. 236), are denied as moot in light of the dismissal of the Motion.

UNITED STATES DISTRICT JUDGE

Parties and Counsel:

John C. Anderson
United States Attorney
Kyle T. Nayback
Jennifer M. Rozzoni
Glynette R. Carson-McNabb
Thomas Aliberti
Jacob Alan Wishard
Assistant United States Attorneys
United States Attorneys Office
Albuquerque, New Mexico

Attorneys for the Plaintiff/Respondent

Willis J. Yazzie
Federal Correctional Institution
Big Spring, Texas

Defendant/Movant pro se

APPENDIX M

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

No. CR 10-01761 JB
No. CIV 18-00206 JB/GBW

WILLIS J. YAZZIE,

Defendant/Movant.

JUDGMENT

THIS MATTER having come before the Court under rule 4 of the Rules Governing Section 2255 Proceedings on the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed March 1, 2018 (Doc. 231)("Motion"), and the Court having entered its Memorandum Opinion and Order, filed January 23, 2018 (Doc. 239), dismissing the Motion,

IT IS ORDERED that final judgment is entered and the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed March 1, 2018 (Doc. 231), is dismissed without prejudice.

UNITED STATES DISTRICT JUDGE

Parties and Counsel:

John C. Anderson
United States Attorney
Kyle T. Nayback
Jennifer M. Rozzoni
Glynette R. Carson-McNabb
Thomas Aliberti
Jacob Alan Wishard
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Willis J. Yazzie
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Big Spring, Texas

Defendant/Movant pro se

APPENDIX N

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

No. 1:10-cr-01761-JB-GBW

No. Civ 18-0206-JB-/GBW

Willis John YAZZIE SR.-Petitioner,

v.

UNITED STATES Of America-Respondent.

MOTION FOR A CERTIFICATE OF APPEALABILITY (COA) PURSUANT TO 28 U.S.C. § 2253(c)

STATEMENT OF THE CASE

Petitioner was denied his Constitutional Right Pursuant to his § 2255 Motion on January 23, 2019. The court's reply was that: "The court entered a Memorandum Opinion and Order Adopting the Magistrate Judge's Proposed Findings and Recommended Disposition, filed October 31, 2015 (Doc. 215)("MOO"), adopting the Magistrate Judge's Proposed Findings and Recommended Disposition and dismissing Yazzie's Fisrst Motion on October 31, 2015. See MOO at 9. In its MOO, the Court concluded that Yazzie had failed to show that he received ineffective assistance of counsel during his criminal trial and denied a certificate of appealability. See MOO at 4,7-9 Yazzie then sought a certificate of appealability from the Tenth Circuit. See Notice of appeal, filed November 9, 2015 (Doc. 216). The Tenth Circuit denied a certificate of appealability, determining that the court was correct in concluding that Yazzie had failed to demonstrate ineffective assistance of counsel. See Order Denying Certificate of Appealability, filed February 4, 2016 (Doc.223). "See (CR Doc.239p.1-2).

Petitioner will demonstrate to this court that his § 2255 Motion was not denied as res judicata or on the merit.

ARGUMENT

In order for petitioner to obtain a COA the district court had to denied his § 2255 Motion on procedural grounds without reaching the prisoner's underlying constitutional claim. See **Slack v. McDaniel**, 529 U.S. 473,478: "Second, when the district court denies a habeas petition on procedural grounds without reaching the Prisoner's underlying constitutional claim, a COA should issue....

Third, a habeas petition which is filed after and initial petition was dismissed without adjudication on the merits for failure to exhaust state

remedies is not a "second or successive"..."

> **Slack**, 529 U.S. at 484-85: "Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one derected at the district court's procedural holding. Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and argument."

The court said that petitioner's first motion arguing ineffective assistance of counsel was dismissed on the merits. And the Tenth Circuit's agreement with the district court's dismissal. The district court's first dismissal was not on the merit by just saying that petitioner did not demonstrate ineffective assistance of counsel, when the district court did not demonstrate that petitioner had an effective assistance of counsel. For example the district court had to demonstrate that in order to establish ineffective assistance of counsel the district had to prove that petitioner's Fourth Amendment was not violated and for that reason he did not received ineffective assistance of counsel. The district court never demonstrated non ineffective assistance of counsel all that was said by the court was that petitioner did not demonstrate ineffective of counsel and nothing more. The district cannot rely on the court of Appeals for the Tenth circuit, because its ruling was wrong under **Buck** v. Davis, 580 U.S.___, 197 L.Ed 2d 1, 17

> "But the question for the Fifth Circuit was not whether Buck had "shown extraordinary circumstances" or shown why [Texas' broken promise] would justify relief from the judgment." Id. at 669,674. Those are ultimate merits determinations the panel should not have reached. We reiterate what we had said before: [6] A "court of appeal should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims, "and ask "only if the District Court's decision was debatable. "**Miller-El**, 537 U.S., at 327,348, 123 S.Ct.1029, 154 L.Ed. 2d 931."

For Tenth Circuit concluding that the district court was correct that petitioner failed to demonstrate ineffective assistance of counsel, the Tenth

Circuit sidesteped the COA process.

Petitioner had shown he was denied his Constitutional Right under the Fourth Amendment. (See CR Doc. 231) Petitioner's initial petition was not denied on the merit and for that reason CR Doc. 231 is also the initial petition until this court decied it on the merit.

> See **Slack**, 529 U.S. at 487-88: The State contents that the prisoner, upon his return to federal court, should be restricted to the claims made in his initial petition. Neither **Rose v. Lundy** nor **Martinez-Villareal** requires this result, which would limit a prisoner to claims made in a pleading that is often uncounseled, hand-written, and pending in federal court only until the State identifies one unexhausted claim. The proposed rule would bar prisoner from raising nonfrivolous claims developed in the subsequent state exhaustion proceedings contemplated by the **Rose** dismissal, even though a federal court had yet to review a single constitutional claim. This result would be contrary to our admonition. that the complete exhaustion rule is not to "trap the unwary prose prisoner. "**Rose,** supra, at 520,71 L.Ed. 2d 379,102 S.Ct. 1198 (internal quotation marks omitted). It is instead more appropriate to treat the initial mixed petition as though it had not been filed, subject to whatever conditions the court attaches to the dismissal. **Rose v. Lundy** dictated that, whatever particular claims the petition contained, none could be considered by the federal court."

The district court's procedural rulings were wrong, by the court saying that petitioner was denied on the merit because he did not demonstrate ineffective assistance of counsel. The merit has to be demonstrated by the district court that petitioner's Fourth, Fifth, and Sixth Amendments were not violated. The district court has to prove that petitioner did not received ineffective assistance of counsel under the Sixth Amendment and just saying petitioner did not demonstrate ineffective assistance of counsel. For these reasons the district court's procedural ruling were wrong and it denied petitioner his Constitutional Rights.

CONCLUSION

For the above reasons petitioner's § 2255 Motion is not a second or successive and would like the court to grant a COA.

Respectfully Submitted, February 4, 2019

/S/ Willis John Gozzi Sr

Federal Correctional Institution
1900 Simler Avenue
Big Spring, TX 79720

APPENDIX O

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

vs.

No. CR 10-1761 JB
No. CIV 18-0206 JB/GBW

WILLIS YAZZIE,
Defendant/Movant.

OPPOSITION TO PETITIONER'S SUCCESSIVE MOTION FOR A CERTIFICATE OF APPEALABILITY PURSUANT TO 28 U.S.C. § 2253(c)

Pursuant to 28 U.S.C. § 2255 and *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) the United States requests dismissal of the Petitioner's motion as a successive motion for a certificate of appealability. The United States will outline its argument in more detail in the memorandum below.

A. Procedural History

A grand jury in the District of New Mexico returned an indictment against Willis J. Yazzie (Yazzie) on June 10, 2010. [Doc. 12]. The indictment charged Yazzie with two counts of aggravated sexual abuse in violation of 18 U.S.C. §§ 1153, 2241(c), and 2246(2)(D). *Id.* The parties resolved the case by entering a plea agreement. [Doc. 38]. Under the terms of the agreement, Yazzie pled guilty to a one-count information that charged him with aggravated sexual abuse. [Doc. 35]. The guilty plea was entered pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. *Id.* at 4. The parties agreed "that a specific sentence between 15 years (180 months) and 19 years (228 months) is the appropriate term of imprisonment in this case." *Id.* In addition, Yazzie waived his right to appeal the "conviction and any sentence." *Id.* at 7. On October 3, 2014 Yazzie filed a first motion to vacate, set aside or correct his sentence under 28 U.S.C. §

2255. In this first motion Yazzie argued to have his conviction set aside due to ineffective assistance of counsel. [Doc. 195, 1-2]. The Court entered a Memorandum Opinion and Order (MOO) dismissing Yazzie's first motion to vacate on October 31, 2015. [Doc. 215]. In its MOO the Court concluded that Yazzie had not met his burden of showing that he had received ineffective assistance of counsel and denied his certificate of appealability. [*Id.* 4, 7-9]. As a result Yazzie moved for a certificate of appealability from the Tenth Circuit Court of Appeals on November 9, 2015.

On February 4, 2016 the Tenth Circuit denied a certificate of appealability, determining that the District Court was correct in concluding that Yazzie had not shown ineffective assistance of counsel. Doc. 223.

On March 1, 2018 Yazzie filed a second motion under 28 U.S.C. § 2255 in the District Court. Yazzie argued that the Court should not have "summarily" rejected his ineffective assistance of counsel argument and sought to raise the same grounds for a second time. [Doc. 231, 4]. This Court filed a Memorandum Opinion and Order of Dismissal on January 23, 2019 dismissing the second motion as a second or successive motion under 28 U.S.C. § 2255. In sum this Court found that Yazzie's second motion was filed "without authorization from a Court of Appeals as required by § 2244(b)(3)(A) and failed to raise "any newly discovered evidence or raise a new rule of constitutional law." [Doc. 239, 3-4].

On February 7, 2019 Yazzie filed a third motion for a certificate of appealability in the District Court raising the same claims presented in his two prior efforts. [Doc. 241]. Specifically, Yazzie now contends that the District Court's dismissal of his first motion was not on the merits because "the district court did not demonstrate that petitioner had an effective assistance of counsel." [Doc. 241, 2]. The United States disagrees. Pursuant to *Strickland v. Washington* the burden to show ineffective assistance of counsel is on the petitioner and Yazzie's attempt at burden

shifting is moot because the third motion is successive and without the requisite authorization or legal substance.

B. Discussion

Section 2255 states that a Court of Appeals panel must certify a second or successive motion to contain: (i) newly discovered evidence that would be sufficient to establish by clear-and-convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (ii) a new rule of constitutional law that was previously unavailable and was made retroactive to cases on the Supreme Court of the United States' collateral review. 28 U.S.C. § 2255(h); [Doc. 239, 3]. Before a movant files a successive application in the District Court the applicant must get authorization from the Court of Appeals requesting consideration by the District Court. 28 U.S.C. § 2244(b)(3); [Doc. 239, 3]. In addition to establish a claim of ineffective assistance of counsel the *petitioner* must show that counsel's performance was deficient, because it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. at 687-88, and that counsel's deficient performance prejudiced him. *Id.* at 687 (emphasis added).

In this case Yazzie now files a third motion for a certificate of appealability. The motion is made without the authorization of the Tenth Circuit Court of Appeals and therefore the District Court lacks jurisdiction. In addition Yazzie asserts no new evidence, or a new constitutional law that was previously unavailable. Finally Yazzie argues that it was the District Court's burden to "demonstrate that petitioner had an effective assistance of counsel." [Doc. 241, 2]. This is an inaccurate statement of the applicable law. The petitioner was required to establish ineffective assistance of counsel not the District Court. Here the District Court and with the Tenth Circuit in agreement ruled that Yazzie failed to meet his burden therefore his first motion failed on the merits.

C. Conclusion

For the above stated reasons the United States requests that this Court dismiss Yazzie's third motion for a certificate of appealability.

Respectfully submitted,

JOHN C. ANDERSON
United States Attorney

s\ Thomas J. Aliberti
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I HEREBY CERTIFY that on February 13, 2019, I filed the foregoing electronically through the CM/ECF system, which caused counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

s\ Thomas J. Aliberti
THOMAS J. ALIBERTI

APPENDIX P

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

CR: 10-1761-JB

CIV: 18-0206-JB/GBW

Willis John YAZZIE SR.-Petitioner,

v.

UNITED STATES of America-Respondent(s).

RESPONSE TO THE U.S. ATTORNEY

The U.S. Attorney had ask the court to dismiss petitioner's motion as a second or successive §2255 motion for a Certificate of Appealability (COA).

The U.S. Attorney has waived their argument when they did not respond to the district judge's Order.

The U.S. Attorney saying that petitioner had to demonstrate ineffective assistance of counsel and petitioner agrees. What petitioner is saying is that the district court had to demonstrate that the defense attorney was "not ineffective" to prove that the district judge's decision was on the merit. Just saying that petitioner did not demonstrate ineffective assistance of counsel is not on the merit because there has to be some evidence that the attorney was not ineffective. The attorney never made an affidavit of what took place not to suppress petitioner's statement. For example the court has to say the petitioner did not demonstrate ineffective assistance of counsel because even if the defense attorney had been granted to suppress petitioner's statement the outcome would be that petitioner's statement was not obtained in the violation of the fourth Amendment. To be denied on the merit it has to be demonstrate that it is on the merit.

I petitioner will stand and still say the the district court's ruling is wrong and is entitled to a COA. And also I would say that the court has

to demonstrate that there was no prejudice to petitioner's case.

CONCLUSION

Petitioner would like the court to grant him the COA.

/s/ Willie John Gazzie Jr

APPENDIX Q

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

1:10-cr-01761-JB-/GBW

1:18-cv-0206-JB-/GBW

YAZZIE SR-Petitioner,

v.

UNITED STATES-Respondent.

MOTION TO COMPEL THE COURT TO ANSWER THE MOTION FOR COA

Petitioner is asking this court why it is taking so long to answer his motion for COA, that was filed in this court on February 7, 2019.

The court cannot prolong the Motion for COA because it is violating petitioner's due process. Petitioner wants this court to answer his COA so that he may proceed to the court of appeals.

Petitioner had told this court from the start to not judge or you will be judge. There is no way for the court to fix the Fourth Amendment Violation. Petitioner is not going to give up, even when he is set free, because there are ways to appeal even when your out.

What the court needs to do is teach the federal officers about probable cause to arrest and not to violate the Fourth Amendment.

/s/ Willis J. Yazzie Sr.

APPENDIX R

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: Willis John **YAZZIE SR.**-Petitioner Pro-Se.

Petition for Writ of Mandamus

to the United States District Court

District of New Mexico

WRIT OF MANDAMUS

Willis John Yazzie Sr. 54228051

Federal Correctional Institution

1900 Simler Avenue

Big Spring, Texas 79720

RELIEF SOUGHT

Petitioner, seeks a Writ of Mandamus to be issued by this court, directing the Honorable James O. Browning, Judge of the United States District Court for the District of New Mexico, in the case entitled **YAZZIE SR. v. UNITED STATES**, Dist. Ct. No. 1:18-cv-0206-JB/GBW, to answer petitioner's Motion for COA, that was filed on February 7, 2019. (CR Doc. 241 or Appendix E).

ISSUES PRESENTED

The following issue are presented on this petition for Writ of Mandamus:

1. Will compliance with the order compelling a decision for COA result in immediate, irreparable injury to petitioner, so that there is no adequate remedy unless this court intervenes by way of Mandamus?
2. Did the non ruling of the district court for COA amounted to a clear abuse of discretion?
3. Is the district court's ruling so callously disregard the COA rulings of this court that intervention by way of Mandamus is necessary in the interests of judicial administration?

STATEMENT OF FACTS

The underlying district court case commenced on March 1, 2018, when the § 2255 Motion (CR Doc. 231-32 or Appendix A and B) was refiled seeking relief pursuant to ineffective assistance of counsel, where Attorney James C. Looman did not have petitioner's statement suppress, where petitioner was illegally detained at the time of interrogation.

Petitioner refiled his § 2255 Motion pursuant to **Stewart v. Martinez-Villareal**, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849(1998) and Memorandum Opinion and Order denying § 2255 Motion by District Judge James O. Browning on January 23, 2019 (CR Doc. 239 or Appendix C).

On February 7, 2019 petitioner put in a Motion for COA ((CR Doc. 241 or Appendix E) and the U.S. Attorney's Response in Opposition (CR Doc. 242 or Appendix F) on February 13, 2019.

Petitioner's Reply Response was on February 26, 2019 (CR Doc. 243 or Appendix G) and petitioner's Motion to Compel to Answer COA on August 15, 2019 (CR Doc. 244 or Appendix H)

No answer from the district court to this time.

ARGUMENT

In **Johnson v. Rogers**, 917 F.2d 1283, 1284(10th Cir. 1990) the court stated that: "The peremptory Writ of Mandamus has traditionally been used in federal courts "to confine an inferior court to a lawful exercise of it prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." **Will v. United States**, 389 U.S. 90, 95, 19 L.Ed. 2d 305, 88 S.Ct. 269(1967)...

> For Mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of respondent to do the action in question, and no other adequate remedy available. **Hadley Memorial Hosp. Inc. v. Schweiker**, 689 F.2d 905, 912(10th Cir. 1982). Petitioner must also show that his rights to the writ is "clear and indisputable." **Mallard v. United States Dist. Court for the S. Dist. of Iowa**, 490 U.S. 296, 109 S.Ct. 1814, 1822, 104 L.Ed.2d 318(1989)..."

Petitioner's clear right to relief is demonstrated in Appendix B and there is not other adequate remedy available at this time and is indisputable. Petitioner would like to have this court to have the district court to answer my Motion for COA with unreasonble delay. Petitioner has demonstrated to the district court that he has merit in his § 2255 Motion.

By petitioner demonstration to the district court that his Constitutional Rights were violated he would had been out of custody from the BOP and for the district court prolonging the COA is violating petitioner's Due Process Rights under the Fifth Amendment.

CONCLUSION

For the above reasons the Writ should issue.

Willis John Yazzie Sr. 54228051
Federal Correctional Institution
1900 Simler Avenue
Big Spring, Texas 79720

CERTIFICATE OF SERVICE

I Pro-Se Petitioner, under penalty of perjury placed a true and correct copy of the foregoing with postage prepaid and affixed into the prison mailbox on September , 2019, and properly addressed to the following:

Mitchell R. Elfers, District Clerk
Pet V. Domenici U.S. Courthouse
333 Lomas Blvd., NW
Albuquerque, New Mexico 87102

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

No. CR 10-1761 JB
No. CIV 18-0206 JB\GBW

WILLIS J. YAZZIE,

Defendant/Movant.

ORDER DENYING A CERTIFICATE OF APPEALABILITY

THIS MATTER comes before the Court on: (i) the Defendant/Movant's Motion for a Certificate of Appealability (COA) Pursuant to 28 U.S.C. § 2255, filed February 7, 2019 (CR Doc. 241)("Motion for COA"); and (ii) the Defendant/Movant's Motion to Compel the Court to Answer the Motion for COA, filed August 15, 2019 (CR Doc. 244). The Court grants the Motion to Compel, denies the Motion for COA, and denies a Certificate of Appealability.

The Court entered a Memorandum Opinion and Order, filed January 23, 2019 (CR Doc. 239)("MOO"), dismissing Movant Willis J. Yazzie's 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence, as an unauthorized second or successive § 2255 motion. The Court dismissed without prejudice the § 2255 Motion for lack of jurisdiction pursuant to 28 U.S.C. § 2244(b)(3)(A). See Final Judgment, filed January 23, 2019 (CR Doc. 240).

Section 2255 provides that a Court of Appeals panel must certify a second or successive motion in accordance with § 2244 to contain: (i) newly discovered evidence that would be sufficient to establish by clear-and-convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (ii) a new rule of constitutional law that was previously

unavailable, and which the Supreme Court of the United States of America made retroactive to cases on collateral review. See 28 U.S.C. § 2255(h). Section 2244 requires that, before a movant files a second or successive application in the district court, the applicant shall move the appropriate Court of Appeals for an order authorizing the district court to consider the application. See 28 U.S.C. § 2244(b)(3)(A). Until a movant receives the required authorization from the Court of Appeals for the Tenth Circuit, the Court is without jurisdiction to entertain the motion and it must be dismissed. See Burton v. Stewart, 549 U.S. 147, 153 (2007)(per curiam). See also United States v. Springer, 875 F.3d 968, 972-73 (10th Cir. 2017). The Court dismissed Yazzie's § 2255 motion because he failed to meet § 2244(b)(3)(A)'s requirements. See MOO at 4.

By statute, an appeal may not be taken to the Court of Appeals from a final order in a proceeding under § 2255 unless a Circuit Justice or Judge issues a certificate of appealability. See 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

Yazzie's Motion for a Certificate of Appealability contends that he has demonstrated denial of a constitutional right. See Motion for COA at 3. Yazzie directs his arguments, however, to the denial of his first 2255 proceeding. See Memorandum Opinion and Order Adopting the Magistrate Judge's Proposed Findings and Recommended Disposition at 9, filed October 31, 2015 (CR Doc. 215). Yazzie's arguments do not address the Court's dismissal of his second § 2255 motion. The Court determines, under rule 11(a) of the Rules Governing Section 2255 Cases, that Yazzie has not made a substantial showing that he has been denied a constitutional right. The Court will deny a certificate of appealability.

IT IS ORDERED that: (i) the Defendant/Movant's Motion to Compel the Court to

Answer the Motion for COA filed by Movant Willis Yazzie is granted; (ii) the Defendant/Movant's Motion for a Certificate of Appealability (COA) Pursuant to 28 U.S.C. § 2255 is denied; and (iii) a Certificate of Appealability is denied.

UNITED STATES DISTRICT JUDGE

Parties and Counsel

John C. Anderson
United States Attorney
Kyle T. Nayback
Jennifer M. Rozzoni
Glynette R. Carson-McNabb
Thomas Aliberti
Jacob Alan Wishard
Assistant United States Attorneys
United States Attorney's Office
Albuquerque, New Mexico

Attorneys for Plaintiff/Respondent

Willis J. Yazzie, Sr.
Federal Correctional Institution
Big Spring, Texas

Defendant/Movant pro se

APPENDIX T

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

CIV 18-0206 JB/GBW
CR 10-1761 JB
Willis John YAZZIE SR.-Petitoner,

v.

UNITED STATES of America-Respondent.

NOTICE OF APPEAL

Notice is hereby given that , Yazzie Sr. v. United States, in the above named case hereby appeal to the United States Court of Appeals for the Tenth Circuit from and Order Denying Certificate of Appealability, enter in this action on October 3, 2019 (CR Doc. 245).

/s/ Willis J Yazzie Sr
10-9-19

APPENDIX #4

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

1:18-cv-00206-JB-GBW

1:10-cr-01761-JB-GBW

Willis John YAZZIE SR.-Petitioner/Plaintiff,

v.

UNITED STATES of America-Respondent/Defendant.

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS
(Fed. R. App. P. 24(a)(1)

Petitioner, moves the court for an order permitting him to prosecute an appeal from the judgment entered by this court on October 3, 2019, in forma pauperis.

GROUNDS FOR MOTION

This motion is authorized by the provisions of Section 1915 of Title 28 United States Code, and by Rule 24 of the Federal Rules of Appellate Procedure.

The required Affidavit of petitioner, which is attached in support of this motion as "Exhibit" " ", shows that petitioner is "a person unable to pay... fees or give security therefor" within the meaning of Section 1915(a)(1) of Title 28.

Petitioner has filed a notice of appeal from the judgment of this court on about October 2019.

Petitioner's desires to assert on appeal, that the decision of this court is erroneous in that the district court denied petitioner that his refiled § 2255 was a second or successive.

The errors described above constitute arguable assertions of law, and are in fact supported by **Stewart v. Martinez-Villareal**, 523 U.S. 637, 140 L.ED.2d 849, 118 S.Ct. 1618(1998).

In seeking to proceed in forma pauperis, petitioner is not required to establish that he will actually prevail on appeal, but only that petitioner's desires to assert arguments on appeal that are not "frivolous." See, e.g., **Free v. United States**, 879 F.2d 1535, 1536(7th Cir. 1989). An appeal is not "frivolous" within the meaning of Section 1915 when it asserts any contention that is , conceivably, arguable. See, e.g., **Livingston v. Adirondack Beverage Co.**, 141 F.3d 434, 437(2nd Cir. 1998). As noted in Paragraph five of this Motion, there is authority that supports the arguments that petitioner desires to assert on appeal.

CONCLUSION

For all of the reasons stated in this motion, petitioner respectfully requests that this motion be granted.

Respectfully Submitted on October 24, 2019.

/S/ _____

Willis John Yazzie Sr. 54228051 Pro-Se
FEDERAL CORRECTIONAL INSTITUTION
1900 Simler Avenue
Big Spring, Texas 79720

Appendix V

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

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

Cr. No. 10-1761 JB/GBW
Civ. No. 18-206 JB/GBW

WILLIS JOHN YAZZIE, SR.,

Defendant/Movant.

ORDER GRANTING MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

THIS MATTER is before the Court under Fed. R. App. P. 24(a) on the Motion for Leave to Appeal In Forma Pauperis filed by Movant Willis John Yazzie, Sr. on October 28, 2019. *CR Doc. 249*. The Court finds that Movant has shown an inability to pay or to give security for fees and costs and that Movant raises issues on appeal that are not frivolous. The Court will grant the Motion.

IT IS ORDERED that the Motion for Leave to Appeal In Forma Pauperis filed by Movant Willis John Yazzie, Sr. on October 28, 2019 (*CR Doc. 249*) is GRANTED.

GREGORY B. WORMUTH
UNITED STATES MAGISTRATE JUDGE

APPENDIX B
Order Denying COA

FILED
United States Court of Appeals
Tenth Circuit

January 29, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIS J. YAZZIE,

Defendant - Appellant.

No. 19-2172
(D.C. Nos. 1:18-CV-00206-JB-GBW &
1:10-CR-01761-JB-GBW-1)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE**, **HARTZ**, and **PHILLIPS**, Circuit Judges.

Willis Yazzie, proceeding pro se, seeks a certificate of appealability (COA) to appeal from the district court's order dismissing for lack of jurisdiction his motion for relief under 28 U.S.C. § 2255. We deny a COA and dismiss this matter.

Yazzie pleaded guilty to and was convicted of aggravated sexual abuse. After we granted the government's motion to enforce the appeal waiver in his plea agreement and dismissed his appeal, *United States v. Yazzie*, 572 F. App'x 663, 664 (10th Cir. 2014), he filed his first § 2255 motion, claiming counsel was ineffective for failing to seek suppression of his incriminating statements. The district court denied the motion on the

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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.

merits and we denied a COA. *United States v. Yazzie*, 633 F. App'x 703, 704 (10th Cir. 2016). Soon thereafter, Yazzie filed a request for authorization to file a second § 2255 motion on similar grounds, which we denied.

Yazzie filed the motion at issue here in 2018, raising the same ineffective assistance of counsel arguments he raised in his first motion. Because he filed this successive § 2255 motion without authorization from this court, the district court dismissed it for lack of jurisdiction. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) ("A district court does not have jurisdiction to address the merits of a second or successive § 2255 . . . claim until this court has granted the required authorization."); *see also* 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application . . . is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."); *id.* § 2255(h). In a separate order, the district court also denied a COA.

To appeal the district court's dismissal of his motion, Yazzie must obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(B); *United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008). We liberally construe his pro se opening brief and application for a COA. *See Hall v. Scott*, 292 F.3d 1264, 1266 (10th Cir. 2002). To obtain a COA where, as here, a district court has dismissed a filing on procedural grounds, the movant must show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We need not address the constitutional question if we

conclude that reasonable jurists would not debate the district court's resolution of the procedural one. *Id.* at 485.

In his application for a COA, Yazzie does not dispute that he previously filed a § 2255 motion and that he did not obtain authorization from this court to file another one. He contends, however, that he is entitled to re-file his original motion because the district court did not adequately address the merits of his claims when it denied that motion. As support, he cites *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-44 (1998), in which the Supreme Court held that a claim dismissed as premature in a first habeas petition did not need authorization to be filed in a later habeas petition. But Yazzie does not have a claim that was previously dismissed as premature that is now ripe for adjudication, as was the case in *Stewart*. And, despite his contention that the district court did not adequately consider his claims in denying his first motion, his disagreement with that ruling does not entitle him to relitigate the same claims in another § 2255 motion. Yazzie has not explained how the district court erred in its procedural ruling dismissing his most recent motion for lack of jurisdiction. Because he has not shown that jurists of reasons would debate whether the district court's procedural ruling was correct, we deny a COA.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX C
Issue on 18 U.S.C. § 3501

United States v. Yazzie Sr., 998 Supp. 2d 1044, 1073-82
February 6, 2014

{998 F. Supp. 2d 1073} 8. Motion to Reconsider.

In a handwritten letter dated June 7, 2013, Yazzie wrote to the Court, asking it to "please reconsider my plea to withdraw or put me on a lesser charge." Motion to Reconsider at 1. Yazzie explains that he "did not understand the law," and that he accepted the plea deal because Mr. Loonam, his attorney at the time, convinced him that he would lose at trial. See Motion to Reconsider at 1. He says that Mr. Loonam tried to convince him that he would lose, because Jane Doe 2 had an STD, and Yazzie {2014 U.S. Dist. LEXIS 71}had an STD in 2008, "but I did not know that a person cannot carry STD [sic] that long." Motion to Reconsider at 1. He says that the Shiprock Police in Shiprock, New Mexico, have Jane Doe 2's diary, in which she states that her uncle's son sexually assaulted her, and that Yazzie's wife has asked for the diary so Yazzie can use it in his case. See Motion to Reconsider at 1. According to Yazzie, Mr. Loonam also convinced him that he would lose at trial because of the statements he made to the FBI regarding Jane Doe 1. See Motion to Reconsider at 1. Yazzie asserts that he did not understand how Miranda v. Arizona works, and Mr. Loonam told him that they could not suppress the statement he made to the FBI, but that he does not think Miranda v. Arizona applies to him, because "there was no formal arrest." Motion to Reconsider at 1. Further, he contends that the FBI forced him to say that he penetrated Jane Doe 1, but that she has never stated that he penetrated her. See Motion to Reconsider at 1. Yazzie states:

> The way I see it I was force[d] to plea [be]cause [Mr. Loonam] has knowledge of the law and I did not. I would of never took the plea even if [Mr. Loonam] try to convince me that {2014 U.S. Dist. LEXIS 72}I'll lose. I would of got convicted on a lesser offense[]. . . . When the Judge ask[ed] me if I was force[d] to plea I said no [be]cause [Mr. Loonam] convince[d] me I would lose and I see that as force [be]cause he knew that I did not know the law to say that its wrong what the FBI did . . . .Motion to Reconsider at 1. Yazzie argues again that he did not use force and that establishing the victims' ages does not establish that he used force. See Motion to Reconsider. Yazzie asks the Court to reconsider its decision to deny the 1st Motion and 2nd Motion, and to allow him to withdraw his guilty plea; he says that he should be found guilty on a lesser charge, because "the plea was not knowing[] when I took it." Motion to Reconsider.

On July 26, 2013, Yazzie's counsel, Ms. Middlebrooks, requested permission from the Court to withdraw from representing Yazzie "after his sentencing is complete on August 8, 2013 or whatever date his sentencing may be complete." Motion to Withdraw and for Appointment of Appellate Counsel, filed July 26, 2013 (Doc. 111) (Motion to Withdraw). Ms. Middlebrooks states as grounds that she is retiring from the practice of law, and "Yazzie intends to appeal this matter {2014 U.S. Dist. LEXIS 73}and will need counsel appointed to perfect the appeal." Motion to Withdraw at 1.

On August 13, 2013, Yazzie, through his attorney Ms. Middlebrooks, supplemented his *pro se* Motion for Reconsideration, explaining that the basis of his Motion for Reconsideration is that "he was not apprised of the law regarding his options for a motion to suppress his statement to the FBI and had he known the law and his options, he would have requested his lawyer to file a suppression motion instead of entering into a plea." Supplement to Motion for Reconsideration of Motion to Withdraw Plea of Guilty at 1, filed August 13, 2013 (Doc. 114) ("Supplement"). Further, "Yazzie contends that had he taken his case to trial, he may only have been convicted on lesser charges and thereby, {998 F. Supp. 2d 1074} received less time than that contemplated in the plea agreement." Supplement at 1. He contends that, "[a]lthough the Federal Rules of Criminal Procedure do not expressly authorize a motion to reconsider," courts normally apply the same standards as those used in civil cases for motions to reconsider; he asserts that the Court "has not clearly comprehended his position," and thus, a motion to reconsider is appropriate. Supplement at 2. {2014 U.S. Dist. LEXIS 74}He explains that the majority of his argument is based on the issues raised in his earlier requests to withdraw his

guilty plea, but he also "provides a new argument that he was 'forced' to take the plea by virtue of the fact his lawyer allegedly withheld law regarding suppression of statements." Supplement at 2. Ms. Middlebrooks asserts that, "even if this was Yazzie's argument in support of his motion to withdraw his plea, this argument was not clear to counsel and was not argued in that specific way to the Court . . . ." Supplement at 2. Regarding the grounds that **Yazzie** contends the Court did not fully appreciate, Ms. Middlebrooks explains that the Court "was fully aware and apprised of Yazzie's contentions of suppression and the fact he believed he could receive a lesser sentence if convicted of a lesser charge," and that the Court "thoroughly and extensively considered the evidence presented and applied the law" when it denied Yazzie's request to withdraw his guilty plea. Supplement at 3. Further, Ms. Middlebrooks notes that the Court was required "only to conclude whether **Yazzie** had a 'full understanding of what the plea connotes and of its consequences,'" and that, although **{2014 U.S. Dist. LEXIS 75}**Yazzie may not have understood "his suppression options and suppression law," this knowledge is not the "equivalent to understanding the plea and its consequences. There is no new evidence that **Yazzie** did not understand the plea and its consequences." Supplement at 3-4 (quoting Boykin v. Alabama, 395 U.S. 238, 244, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)).

Regarding Yazzie's new argument --"that he was 'forced' to take a plea because his lawyer withheld case law from him on suppression matters" -- Ms. Middlebrooks says that there is evidence that **Yazzie** was concerned about the statements he made to the FBI before he entered his plea, but that Mr. Loonam "did not discuss the issue of custodial statements with **Yazzie** until after the plea hearing," and that "[i]t is unclear whether Mr. Loonam discussed any other basis for suppression of statements such as force or coercion, prior to the plea." Supplement at 4. Ms. Middlebrooks states that, while "a plea may be involuntary if counsel informs the defendant that he has no choice" but to plead guilty, a lawyer's role is to "assimilate and synthesize information" to help a client make the best choice, and "'[a]dvice -- even strong urging by counsel does not invalidate a guilty **{2014 U.S. Dist. LEXIS 76}**plea.'" Supplement at 5 (quoting Fields v. Gibson, 277 F.3d 1203, 1214 (10th Cir. 2002)). Ms. Middlebrooks states that she does not know what Mr. Loonam considered, such as suppression issues in light of "the overwhelming evidence against **Yazzie**, including Yazzie's own multiple admissions of guilt to the Court," and whether **Yazzie** could be convicted of a lesser offense, such as criminal sexual contact. Supplement at 5. Ms. Middlebrooks notes that, although **Yazzie** says "that he was strong-armed by Mr. Loonam to take the plea," Mr. Loonam's "'strong urging' . . . may not invalidate a plea unless **Yazzie** clearly was not advised of all potential defenses and allowed to make a meaningful and knowledgeable decision whether to plead." Supplement at 5 (quoting Fields v. Gibson, 277 F.3d at 1214). Ms. Middlebrooks expresses concern that, if **Yazzie** withdraws his guilty plea, he may be "found guilty by a jury of the offenses for which he is indicted and receive a **{998 F. Supp. 2d 1075}** substantially hefty penalty and sentence." Supplement at 5.

Yazzie filed the Unopposed Motion to Continue Sentencing, filed August 14, 2013 (Doc. 115) ("Motion to Continue"), requesting the Court to vacate the sentencing set for August **{2014 U.S. Dist. LEXIS 77}**16, 2013, and to continue the sentencing to a later date; as grounds, Ms. Middlebrooks states that she "has had discussions with Yazzie's previous counsel, Jim Loonam, which contradict and impact the supplement filed on Yazzie's behalf." Motion to Continue ¶ 2, at 1.

> Undersigned counsel requests additional time in order to visit with **Yazzie**, review the supplement, case law pertaining to reconsideration motions, and to discuss the conversation with Mr. Loonam. Depending on the outcome of this meeting, undersigned counsel may either withdraw the motion to reconsider or will be filing an amendment to the supplement.Motion to Continue ¶ 3, at 1. The Court granted the Motion to Continue on August 16, 2013. See Order Granting Motion to Continue August 16, 2013 Sentencing Hearing, filed August 16, 2013 (Doc.

116).

In the Second Supplement to Motion for Reconsideration of Motion to Withdraw Plea of Guilty, filed August 19, 2013 (Doc. 117) ("Second Supplement"), **Yazzie**, through his counsel, reasserts his position that the Court did not "have a sufficient understanding of his position pertaining to his request to withdraw his guilty plea," and that Mr. Loonam "did not sufficiently advise him of **{2014 U.S. Dist. LEXIS 78}**his legal defenses in order to allow him to make an informed decision as to whether to enter into a guilty plea," essentially forcing him to enter the plea. Second Supplement at 1. **Yazzie** explains that he "personally believes Mr. Loonam withheld relevant case law from him," but "concedes that he does not have evidence that Mr. Loonam intentionally withheld case law from him in order to coerce him to take a plea." Second Supplement at 1-2. Nonetheless, **Yazzie** argues that "he was forced to take a plea by actions of his attorney and by his lack of knowledge of law he believes supports a suppression of his statement to the FBI as well as suppression of other evidence." Second Supplement at 2.

Yazzie concedes several issues regarding his interactions with Mr. Loonam, and waives at least some attorney-client privilege related to these discussions:

> Prior to the plea, Mr. Loonam discussed the issues regarding a forced and coerced confession with **Yazzie** and advised **Yazzie** that the FBI can force a defendant to make statements and that in his opinion, there was no way to challenge the statement **Yazzie** gave to the FBI. Mr. Loonam told **Yazzie** that he would "fight for" **Yazzie** if he chose to do that. **{2014 U.S. Dist. LEXIS 79}**Mr. Loonam also advised **Yazzie** that the evidence consisting of Yazzie's medical records that were obtained by the FBI showed that **Yazzie** had a sexually transmitted disease ("STD") and that Jane Doe #2 also had an STD. Mr. Loonam advised **Yazzie** that he felt this evidence and his statement to the FBI would result in a conviction for **Yazzie**. One week prior to the trial date, Mr. Loonam met with **Yazzie** again and told him he better take the plea because the trial date was the following week.Second Supplement at 2. **Yazzie** argues that Mr. Loonam did not request the Court to continue the trial date to allow **Yazzie** further time to consider the plea and did not discuss with him the merits of suppressing the plea under 18 U.S.C. § **3501**(c), which excludes a confession that was made more than six hours after arrest but before arraignment, when the delay between arrest and arraignment is unreasonable, even if the confession was voluntary. See Second Supplement at 2-3. **{998 F. Supp. 2d 1076}** **Yazzie** explains that Shiprock Police arrested him on a bench warrant for an unrelated matter, and that the Shiprock court was going to release him
>
> until the Shiprock prosecutor informed the court that **Yazzie** had a federal hold regarding **{2014 U.S. Dist. LEXIS 80}**this matter. At the time, **Yazzie** had not been indicted by a federal grand jury for these charges. **Yazzie** remained in custody until he was interrogated by the FBI on these charges approximately two or three days after the Shiprock court announced his federal hold.Second Supplement at 3 n.3. **Yazzie** contends that he was "arrested" when a federal hold was placed on him and that his confession must be suppressed due to unreasonable delay. Second Supplement at 3 n.3. Further, **Yazzie** contends that Mr. Loonam stressed the damaging connection between Yazzie's medical records, which revealed he had been treated for an STD years earlier, and that Jane Doe 2 allegedly had an STD, but that Mr. Loonam did not discuss suppressing Yazzie's medical records, "which were received in violation of [the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 ("HIPAA")] . . . [and] obtained without Yazzie's consent or waiver of his privacy interests and in violation of his Constitutional rights to privacy," although the law provides remedies to suppress medical records that were obtained by compelled disclosure. Second Supplement at 3. **Yazzie** argues that

"confidential **{2014 U.S. Dist. LEXIS 81}**medical information is entitled to constitutional privacy protection," and that "[t]he HIPPA [sic] laws further forbid disclosure of a patient's medical records or discussion of those records unless that privileged care is waived by the patient." Second Supplement at 3-4 n.3 (citations omitted). Yazzie asserts that he took the plea "based on his lack of knowledge of 18 U.S.C. § 3501(c) and the fact Mr. Loonam felt Yazzie's medical records containing a reference to an STD would result in a conviction"; it was only after the plea that Mr. Loonam discussed and researched 18 U.S.C. § 3501(c) for Yazzie, but "Yazzie had no knowledge to this day of his rights under HIPPA [sic] and that matter was never discussed." Second Supplement at 4.

Ms. Middlebrooks explains that she communicated with Mr. Loonam via electronic mail on August 14, 2013, and that Mr. Loonam said he discussed suppression issues with Yazzie before the plea, although he did not specifically discuss 18 U.S.C. § 3501(c) with Yazzie until after the plea; Mr. Loonam said that his and a colleague's assessment was that "there was no viable suppression of Yazzie's statement," but he would have argued for suppression had Yazzie chosen **{2014 U.S. Dist. LEXIS 82}**trial. Second Suppression at 4. Yazzie argues that, although he does not have evidence that "Loonam intentionally withheld law from him," the Court should allow him to withdraw his guilty plea, because "he did not know the law of 18 U.S.C. § 3501(c) prior to his plea and because he erroneously believed he would be faced with his medical records containing reference to an STD," and thus, "he was 'forced' to take a plea." Second Supplement at 4.

9. Hearing on the Motion to Reconsider.

The Court held a hearing on September 13, 2013; Ms. Middlebrooks, on behalf of Yazzie, began by explaining that the Motion to Reconsider raises issues that Yazzie believes were not adequately before the Court at the February 4, 2012 hearing; although he concedes that the Court considered his argument that he was not informed of his options regarding suppressing his statements, he argues that his plea was not knowingly and voluntarily made, and that the Court focused its analysis on whether he understood the plea and its consequences rather than whether he understood **{998 F. Supp. 2d 1077}** his alternative courses of action before he entered the plea. See Transcript of Hearing at 5:23-7:1 (Middlebrooks), taken September 13, 2013 **{2014 U.S. Dist. LEXIS 83}**("Sept. 13 Tr."). Ms. Middlebrooks stated that she takes responsibility for the confusion, because she argued at the original hearing that Yazzie made a knowing and voluntary plea based on Dr. Foote's competence finding:

> I recall very well my direct statement to the Court was, this was a knowing and voluntary plea on the basis that Dr. Foote had done a psychological evaluation of Mr. Yazzie and determined that not only was he competent to understand what was happening in the proceedings, but he was competent to understand what happened in the plea agreement, and that there was no force or coercion based on the questions that Dr. Foote had asked Mr. Yazzie.Sept. 13 Tr. at 7:4-11 (Middlebrooks). She explained that she did not realize that Yazzie's argument was opposite of what she had argued at the initial hearing until she spoke with Yazzie in preparation for sentencing. See Sept. 13 Tr. at 7:15-25 (Middlebrooks). Ms. Middlebrooks said that Yazzie has waived his attorney-client privilege related to the conversations he had with Mr. Loonam before he entered his plea, and that Yazzie has been "very candid" with her regarding his discussions with Mr. Loonam; Yazzie concedes that Mr. Loonam **{2014 U.S. Dist. LEXIS 84}**discussed suppressing forced and coerced statements, and that Mr. Loonam's colleague reviewed the issue and came to the same conclusion that they could not suppress the statements, but Yazzie says Mr. Loonam did not discuss suppressing statements under 18 U.S.C. § 3501. Sept. 13 Tr. at 8:7-25 (Middlebrooks). Ms. Middlebrooks explained that 18 U.S.C. § 3501 permits a court to

suppress a statement that, although made voluntarily, was made more than six hours after the time of arrest when the time between the arrest and arraignment is unreasonable. See Sept. 13 Tr. at 9:1-7 (Middlebrooks). Ms. Middlebrooks said that Mr. Loonam did not discuss this provision with **Yazzie** until after the plea hearing, when **Yazzie** raised the issue with Mr. Loonam; **Yazzie** did not initially have library access at the Torrance County detention center, but when he gained access, he made a "conscious effort to . . . try to understand what was going on with his case legally." Sept. 13 Tr. at 9:10-24 (Middlebrooks). After **Yazzie** raised the issue with Mr. Loonam, Mr. Loonam concluded that "there was a reasonable delay in this case" and that, therefore, 18 U.S.C. § **3501** would not apply to suppress Yazzie's statements. **{2014 U.S. Dist. LEXIS 85}**Sept. 13 Tr. at 9:22-24 (Middlebrooks).

Ms. Middlebrooks admitted that she has "looked into the issue very peripherally," but that the evidence she has seen is unclear regarding when **Yazzie** was arrested: he was initially arrested on a DWI, and while the DWI proceedings were pending in the tribal court, there were also pending proceedings regarding custody of the children and whether they would be taken out of the home and placed elsewhere. Sept. 13 Tr. at 9:25-11:9 (Middlebrooks). She said that she believes **Yazzie** was arrested on May 4 or 5, 2010, went to tribal court on either May 4 or 5, 2010, and was supposed to be released, but "it was announced that there was a fee hold on him for these charges," and so he was held in custody and the FBI interviewed him. Sept. 13 Tr. at 10:10-17 (Middlebrooks). Ms. Middlebrooks stated that she did not know if it was a "true hold," but that charges were filed on May 10 or 11, 2010. Sept. 13 Tr. at 10:18-25 (Court, Middlebrooks). Ms. Middlebrooks said that the documents which she has reviewed "are very confusing to read," because they are dated 2006 and 2007, but refer to events in 2010, and that she would need to see the documentation from tribal **{2014 U.S. Dist. LEXIS 86}**court "and then **{998 F. Supp. 2d 1078}** probably speak to someone in the tribal court to understand why their documents read that way, what was happening, when was the actual arrest . . . was there a federal hold and things of that nature." Sept. 13 Tr. at 11:7-23 (Middlebrooks). The Court noted that there would not be a federal hold unless **Yazzie** was charged; Ms. Middlebrooks said she believed that statement is true, but that the Criminal Complaint was not filed until May 10 or 11, 2010. See Sept. 13 Tr. at 11:24-12:16 (Court, Middlebrooks). Ms. Middlebrooks explained that **Yazzie** believes he was technically in federal custody "when it was announced in the tribal court that he was on a federal hold," and that his "six hours would have started to tick at that point"; after Ms. Middlebrooks conferred with **Yazzie**, she said that **Yazzie** was detained on the federal hold on May 7. Sept. 13 Tr. at 13:2-18 (Court, Middlebrooks, **Yazzie**). **Yazzie** made his confession on May 10. See Sept. 13 Tr. at 13:19-25 (Court, **Yazzie**, Middlebrooks). As Ms. Middlebrooks understood the situation, Mr. Loonam concluded that **Yazzie** was not arrested on federal charges until May 10 or 11, that reasonable delay could include transporting **{2014 U.S. Dist. LEXIS 87}****Yazzie** from Shiprock to Albuquerque, New Mexico for initial proceedings or events taking place over a weekend, that there was a reasonable delay between arrest and when **Yazzie** confessed, and therefore, 18 U.S.C. § **3501** would not apply to suppress Yazzie's statements. See Sept. 13 Tr. at 14:2-11 (Middlebrooks). Ms. Middlebrooks explained that, if **Yazzie** was arrested or on a federal hold prior to May 10 or 11, 2010, when the charges were filed, then "there would be some merit to this argument" that his confession should be suppressed under 18 U.S.C. § **3501**. Sept. 13 Tr. at 14:12-15:3 (Middlebrooks). After conferring with **Yazzie**, Ms. Middlebrooks clarified that **Yazzie** was arrested in tribal court on May 7, 2010, he went to court on May 8, 2010, at which point it was announced that there was a federal hold, he made his confession and was transferred into federal custody on May 10, 2010, and the Criminal Complaint and initial appearance came on May 11, 2010. See Sept. 13 Tr. at 30:13-31:5 (Middlebrooks, Court).

Ms. Middlebrooks explained that the other issue **Yazzie** wishes the Court to consider relates to the

connection between his medical records, revealing that he had an STD, and that Jane {2014 U.S. Dist. LEXIS 88}Doe 2 allegedly had an STD, and that Mr. Loonam never discussed with Yazzie the possibility of suppressing his medical records. See Sept. 13 Tr. at 15:15-16:6 (Middlebrooks). Ms. Middlebrooks said that the United States subpoenaed the medical records and obtained them in violation of HIPAA, and that Yazzie never waived his privilege regarding those records. See Sept. 13 Tr. at 16:7-17 (Court, Middlebrooks). Ms. Middlebrooks asserted that HIPAA provides six specific exceptions for law enforcement to obtain medical records, but none of those exceptions would apply in Yazzie's case; further, there may have been other arguments that the way the United States obtained Yazzie's medical records violated his constitutional rights and rights to medical privacy. See Sept. 13 Tr. at 16:17-17:9 (Middlebrooks). Ms. Middlebrooks explained that, while she was uncertain whether Yazzie's statement could have been suppressed under 18 U.S.C. § 3501, she is more confident that the medical records could have been suppressed. See Sept. 13 Tr. at 17:10-17 (Middlebrooks). Ms. Middlebrooks conceded that, even if the Court had suppressed the medical records, there would have been "other factors and other issues {2014 U.S. Dist. LEXIS 89}in the discovery that [Yazzie] would have to overcome at trial"; she explained that Yazzie's concern is that he did not have an understanding of 18 U.S.C. § 3501(c) or his HIPAA rights until after he pled guilty, and that, because he did not understand his alternatives and {998 F. Supp. 2d 1079} possible defenses, the plea was not knowing and voluntary. See Sept. 13 Tr. at 17:18-18:10 (Middlebrooks). Although Yazzie initially seemed to argue that Mr. Loonam intentionally withheld law, Ms. Middlebrooks said that Yazzie does not have evidence of that action and that, thus, Yazzie's argument is that Mr. Loonam did not sufficiently explore these issues with Yazzie to enable Yazzie to make an informed decision. See Sept. 13 Tr. at 18:11-23 (Middlebrooks).

The Court asked the parties about the Sentencing Guidelines range for Yazzie; Ms. Middlebrooks said the latest addendum to the PSR -- the Fifth Addendum -- set the offense level at 40, criminal history category I, resulting in a sentencing guidelines range of 292 to 365 months. See Sept. 13 Tr. at 19:12-20:2 (Court, Middlebrooks). Ms. Middlebrooks said that the Plea Agreement has a proposed range of 15 to 19 years, and that the United States is asking for 19 {2014 U.S. Dist. LEXIS 90}years, but Yazzie is asking for 15 years. See Sept. 13 Tr. at 20:3-10 (Middlebrooks). Ms. Middlebrooks explained that the 15 to 19 year range is favorable if he were convicted on the statute to which he pled guilty, but that Yazzie is arguing that the most appropriate offense is abusive sexual contact, because, although he is not asserting outright innocence, he says that he never penetrated Jane Doe 1 with his finger. See Sept. 13 Tr. at 20:11-21:4 (Middlebrooks). Ms. Middlebrooks asserted that Yazzie understands his situation that, if he were to go to trial, he could be convicted and sentenced to a substantial amount of time, but he also believes he could be convicted of a lesser statute that carries a penalty of ten years or less. See Sept. 13 Tr. at 21:7-19 (Middlebrooks). Ms. Middlebrooks said that, if the Court were to sustain all of Yazzie's objections to the PSR and addendums, the sentence would be 15 years, consistent with the low end of the 11(c)(1)(C) agreement. See Sept. 13 Tr. at 21:20-23:8 (Court, Middlebrooks).13 The United States agreed with Yazzie's initial calculation of an offense level at 40, criminal history category at I, placing the Sentencing Guidelines range {2014 U.S. Dist. LEXIS 91}between 292 to 365 months. See Sept. 13 Tr. at 23:23-24:6 (Wishard). Yazzie objected to the PSR, stating that the conduct that the USPO described did not meet the definition of a sexual act; according to Yazzie, this error led the USPO to mistakenly apply a 4-level enhancement under U.S.S.G. § 2A3.1(b)(1), and, if sustained, would lower the range to 188 to 235 months. See Sept. 13 Tr. at 24:20-25:18 (Court, Middlebrooks); Sentencing Memo. at 3. Further, Yazzie objects to the 5-level upward adjustment under U.S.S.G. § 4B1.5(b)(1); if sustained, Yazzie said that would lower the level to 29.14 See Sept. 13 Tr. at 26:17-25 (Middlebrooks); Sentencing Memo. Addendum at 1. Yazzie explained that the USPO already dropped his criminal history category to 1. See Sept. 13 Tr. at 27:6-10 (Middlebrooks).

Ms. Middlebrooks said this case has been a difficult one for her to present **{2014 U.S. Dist. LEXIS 92}**from a sentencing standpoint, because on one hand, **Yazzie** pled guilty to the facts stated in the Plea Agreement, but on the other hand, **Yazzie** denies the factual basis, saying that penetration never occurred and that he, at most, committed sexual contact, not a sexual act. See Sept. 13 Tr. at 27:22-28:4 (Middlebrooks).

> I understand how complicated and messy this could be, because the arguments **{998 F. Supp. 2d 1080}** that I felt I had to raise are based on what my client has told me, which [are] extremely different than the plea agreement. And I've advised the client the consequences that he could face in terms of arguing against the plea agreement . . . .Sept. 13 Tr. at 28:20-25 (Middlebrooks). Ms. Middlebrooks stated that she is concerned that the United States Attorney's Office could withdraw the Plea Agreement, and although **Yazzie** would prefer that action, she is concerned about the amount of time **Yazzie** could serve if he were to be convicted at trial; he was originally indicted under 18 U.S.C. § 2241(c) for a sexual act involving minors, which carries a mandatory minimum of thirty years to life in prison, but he pled to 18 U.S.C. § 2241(a), which does not have a mandatory minimum but can carry a life **{2014 U.S. Dist. LEXIS 93}**sentence. See Sept. 13 Tr. at 29:1-15 (Middlebrooks). **Yazzie** contends that he should have pled to 18 U.S.C. § 2244, abusive sexual contact, and that the penalty for that crime is up to ten years. See Sept. 13 Tr. at 29:16-23 (Middlebrooks). "[H]e understands if he were to go to trial he could be convicted and face a mandatory minimum of 30 years, but he also believes it's possible a jury could convict him of a lesser statute, in which case he may be looking at less time . . . ." Sept. 13 Tr. at 29:19-23 (Middlebrooks). Ms. Middlebrooks acknowledged that the Court said in its MOO that it did not want to play a guessing game and that it has no way to determine what would happen at trial. See Sept. 13 Tr. at 29:24-31:4 (Middlebrooks).

The Court noted that, if it sustains the objections to the PSR, then it will be working with a Sentencing Guidelines range that is roughly equal to the plea deal, and that, when it denied the request to withdraw the plea, it was considering a much higher range of 360 months to life; the Court said it would likely need to resolve the objections to the PSR to determine what the applicable Sentencing Guidelines range would be. See Sept. 13 Tr. at 31:12-25 (Court). **{2014 U.S. Dist. LEXIS 94}**The Court asked whether the United States could prove the United States Probation Office's enhancements by the preponderance of the evidence; based on the relaxed rules of evidence and relaxed standard, the United States asserted it could prove the enhancements by a preponderance of the evidence, placing **Yazzie** at an offense level of 40. See Sept. 13 Tr. at 32:4-14 (Court, Wishard). The United States said that, if **Yazzie** objected, the Court could ascribe whatever weight it felt Yazzie's current testimony deserves versus what he said in the past, and could also consider what the victims said shortly after the alleged incidents. See Sept. 13 Tr. at 32:15-33:4 (Court, Wishard). The United States said that it probably would not include the victims' testimony at trial, and that the change in the victims' testimony weighs against allowing **Yazzie** to withdraw, because the United States would have difficulty proving its case now that time has elapsed. See Sept. 13 Tr. at 33:2-16 (Wishard, Court). The United States argued that, at the appellate level, the Motion to Reconsider would have been filed as an Anders brief,15 and stated that **{998 F. Supp. 2d 1081}** "it really feels as though we're replowing ground here . **{2014 U.S. Dist. LEXIS 95}**. . alleging ineffective assistance of Mr. Loonam in negotiating and executing the plea agreement"; further, the United States contended that if the Court were to sustain all the objections, the Sentencing Guidelines range would still be in line with the range in the 11(c)(1)(C) agreement. Sept. 13 Tr. at 33:17-34:7 (Wishard). "[A] big factor in the Court's reasoning was you didn't want to preside over another train wreck, and this trial would be a slow and painful process if the Court were to allow him to withdraw the plea." Sept. 13 Tr. at 34:8-11 (Wishard).

The <*pg. 875> Rule does not particularize the factors that

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justify relief, but we have previously noted that it provides courts with authority "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," Klapprott v United States, 335 US 601, 614-615, 93 L Ed 266, 69 S Ct 384 (1949), while also cautioning that it should only be applied in "extraordinary circumstances," Ackermann v United States, 340 US 193, 95 L Ed 207, 71 S Ct 209 (1950). Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all § 455(a) violations. We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' " In re Murchison, 349 US 133, 136, 99 L Ed 942, 75 S Ct 623 (1955) (citation omitted).

[2c][15][16a] Like the Court of Appeals, we accept the District Court's finding that while the case was actually being tried Judge Collins did not have actual knowledge of Loyola's interest in the dispute over the ownership of St. Jude and its precious certificate of need. When a busy federal judge concentrates his or her full attention on a pending case, personal concerns are easily forgotten. The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of

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judges.[12] The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S Rep No 93-419, at 5; HR Rep No. 93-1453, at 5. Thus, it is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question Judge Collins' impartiality. There are at least four such facts.

[2d] First, it is remarkable that the judge, who had regularly attended the meetings of the Board of Trustees since 1977, completely forgot about the University's interest in having a hospital constructed on its <*pg. 876> property in Kenner. The importance of the project to the University is indicated by the fact that the 80-acre parcel, which represented only about 40% of the entire tract owned by the University, was sold for $6,694,000 and that the rezoning would substantially increase the value of the remaining 60%. The "negotiations with the developers of the St. Jude Hospital" were the subject of discussion and formal action by the trustees at a meeting attended by Judge Collins only a few days before the lawsuit was filed. App 35.

The United States asked the Court to find that the PSR is {2014 U.S. Dist. LEXIS 96}correctly calculated or, if the Court sustains Yazzie's objections, to sentence **Yazzie** within the guideline range, to grant Ms. Middlebrooks' Motion to Withdraw after sentencing, and to "allow the appellate attorney to start to tease some of these issues out in a way that we can litigate in a linear and rational form." Sept. 13 Tr. at 34:22-35:3 (Wishard). The Court noted that it would be best to calculate the sentencing range, but that is difficult because it is such a large range, and, if **Yazzie** were to go to trial, the United States might recharge him or seek other counts rather than those to which he pled. See Sept. 13 Tr. at 35:10-36:3 (Court). The Court asked, if it were to hold a hearing on the factual statements in the PSR, what **Yazzie** would do to put the statements in issue. See Sept. 13 Tr. at 36:8-12 (Court). Ms. Middlebrooks said that, in the discovery, the victims "have never made any admission whatsoever of the penetration of the finger. That statement came from Mr. **Yazzie** in his interview with the FBI, which, of course, Mr. Yazzie's position is that he was forced and coerced to say these things . . . ." Sept. 13 Tr. at 36:13-17 (Middlebrooks). She said that, during the {2014 U.S. Dist. LEXIS 97}interview, **Yazzie** repeatedly denied penetration, and after some length of time, the FBI asked something to the effect of "'well, don't you think you may have penetrated her slightly?' or something along those lines and he said basic[al]ly 'if you say so,' which at this point he's made an admission that he penetrated her with his finger." Sept. 13 Tr. at 36:20-37:1 (Middlebrooks). Ms. Middlebrooks asserted that **Yazzie** would testify at an evidentiary hearing, stating his version of the events, and that she does not know to what the victims would testify; they have not heretofore said that he penetrated them with his finger, and they sent vague letters denying some of their previous allegations. See Sept. 13 Tr. at 37:5-9 (Middlebrooks). Ms. Middlebrooks said Jones, Yazzie's counsel before her, hired investigators to contact the victims and find out what allegations they deny, but they did not respond; Ms. Middlebrooks said that she assumes that, if they came to court, they would not say that there was any penetration. See Sept. 13 Tr. at 37:10-18 (Middlebrooks). In Ms. Middlebrooks' view, she is not making an Anders motion, because she believes the arguments she presented have merit. {2014 U.S. Dist. LEXIS 98}See Sept. 13 Tr. at 37:19-38:2 (Court, Middlebrooks). She said she shares the Court's concern that, if **Yazzie** withdraws his plea, he could be hit with the mandatory minimum of thirty years. See Sept. 13 Tr. at 38:3-12. Although "it may go the other way" and **Yazzie** may get convicted under a different statute with a ten-year sentence, she said that she is not sure, if she were making the call, that she would risk the possible thirty years when the difference between the Plea Agreement and the lesser conviction is five years. See Sept. 13 Tr. at 38:3-17 (Middlebrooks). Ms. Middlebrooks noted that the Plea Agreement would likely come into evidence at trial and it would take a lot of explanation why **Yazzie** admitted these facts and now denies them. See Sept. 13 Tr. at 38:18-23 {998 F. Supp. 2d 1082} (Middlebrooks). On the other hand, although he made additional admissions in the letters to the Court, stating that he knew what he did was wrong, he did not admit any penetration. See Sept. 13 Tr. at 38:23-39:3 (Middlebrooks)(not stating which letters, but probably referring to the May 2, 2011 Letter, in which **Yazzie** says: "Yes I did wrong with JD1 but we did that with no madness or force and she the one that like {2014 U.S. Dist. LEXIS 99}me but I should of not did what I did with her"; and the May 15, 2011 Letter at 1, in which **Yazzie** says: "Because of my wrong confession that is why I'm saying that I did not use force and penetration. I should have been under sexual contact for my charge. Also [Jane Doe 1's] statement say[s] that there was no penetration. I'm sorry for what I have done and forgive me."). Ms. Middlebrooks said those letters would likely come into evidence, but would not hurt Yazzie's position that he is guilty of sexual contact rather than of a sexual act; the problem, in Ms. Middlebrooks' view, is that **Yazzie** would be in the difficult position of trying to explain too much to the jury, when he should be focusing on creating reasonable doubt. See Sept. 13 Tr. at 39:3-23 (Middlebrooks). The Court asked what **Yazzie** would do if it held a hearing "to deal with the objection to the factual statements in the PSR" and to determine what to do on the 1st Motion and 2nd Motion;

the Court specifically questioned whether Ms. Middlebrooks wanted to be in the position of putting Yazzie on the stand to testify under oath. Sept. 13 Tr. at 40:18-41:7 (Court, Middlebrooks). Ms. Middlebrooks said that she had no reason **{2014 U.S. Dist. LEXIS 100}**to doubt Yazzie and that the statement he made to the FBI was not under oath. See Sept. 13 Tr. at 41:3-15 (Middlebrooks).

10. **Additional Filings**.