APPENDIX

INDEX TO APPENDICES

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15316
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-00134-MW-GRJ,
1:14-cr-00015-MW-GRJ-1

JOSEPH MICHAEL DIAZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(January 13, 2020)

Before WILSON, BRANCH, and FAY, Circuit Judges.

PER CURIAM:

Joseph Diaz appeals the denial of his 28 U.S.C. § 2255 motion to vacate his sentence. We issued a certificate of appealability (COA) on two issues:

(1) whether Diaz's counsel was ineffective for failing to object to the district court's enhancement of Diaz's sentence under U.S.S.G. § 2G2.1(b)(2)(A); and (2) whether the district court erred by failing to hold an evidentiary hearing to determine whether his counsel was ineffective for failing to file a notice of appeal. Because Diaz has not demonstrated reversible error on either issue, we affirm.

BACKGROUND

Diaz is serving a 720-month sentence for two counts of producing child pornography, in violation of 18 U.S.C. § 2251(a). Briefly stated, Diaz was a teacher and swim coach who used the latter position to abuse minor boys. Five members of his swim team—each of whom were over 12 years of age, but younger than 16—reported that they engaged in various forms of sexual activity that were either filmed or photographed as part of an "initiation." The "initiation" involved three levels, where, at the direction of Diaz, the children: (1) exposed their privates to Diaz, (2) used Diaz's phone to take nude photos of themselves, and (3) used Diaz's phone to record videos of themselves masturbating. A search of Diaz's various media devices yielded over 1,000 videos and over 9,000 images of child pornography, including images of the members of the swim team who were "initiated" into Diaz's "club." Though indicted on six counts of production of child pornography, with the benefit of a plea agreement, Diaz pled guilty to only Counts One and Two.

Probation prepared a presentence report (PSR), which indicated that U.S.S.G. § 2G2.1 was the appropriate guideline for both Counts One and Two.[1] Diaz's adjusted offense level was 42 and his criminal history category was I. His recommended guideline range was 360 months' imprisonment to life on each count. Of the various enhancements and adjustments to his offense level, only one is relevant here: under § 2G2.1(b)(2)(A), a two-level enhancement was added to both counts because the offense involved the commission of a sexual act or contact. According to the PSR, the enhancement was warranted because Diaz "masturbated in front of the victims and at times would have the victims masturbate themselves and/or each other while he watched." Diaz's counsel did not object to this recommended enhancement.

Diaz was sentenced to 360 months' imprisonment on each count, to run consecutively, followed by a lifetime of supervised release. He did not appeal his convictions or sentences.

DISCUSSION

I.

In his § 2255 motion, Diaz claims that his counsel was ineffective for failing to object to the district court's application of the two-level enhancement under

[1] Diaz was sentenced under the 2013 Sentencing Guidelines. Therefore, all guideline citations are to that version.

§ 2G2.1(b)(2)(A). In his view, the behavior supporting the enhancement—that he masturbated in front of the victims or had them masturbate themselves—was not relevant conduct that the district court could consider because there was insufficient evidence that he committed these acts in preparation for, during the commission of, or in order to avoid detection or responsibility for the offenses of conviction. Specifically, Diaz contends that because he was convicted of conduct that occurred *before* the behavior supporting the enhancement, the latter could not support the former as relevant conduct. He also argues that counsel should have been aware that other circuits have narrowed the acts considered as relevant conduct. Therefore, Diaz argues his counsel should have objected to the application of this enhancement.

When reviewing the denial of a § 2255 motion, we review legal conclusions de novo and findings of fact for clear error. *Spencer v. United States*, 773 F.3d 1132, 1137 (11th Cir. 2014) (en banc). Whether trial counsel was ineffective is a mixed question of law and fact that is reviewed de novo. *United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir. 2002). To succeed on an ineffective-assistance claim, a movant must show that: (1) his attorney's conduct was deficient; and (2) the deficient conduct prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). But there is no reason for a court deciding an ineffective-assistance-of-counsel claim to address both components of the *Strickland* inquiry if

the movant makes an insufficient showing on one. *See Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000).

Assuming, without deciding, that an objection to the § 2G2.1(b)(2)(A) enhancement would have been meritorious, we begin—and end—our inquiry with the deficiency prong of the *Strickland* analysis.[2] Counsel's conduct is deficient if it falls below the wide range of competence demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 687. Successful ineffective-assistance claims demonstrate "that no competent counsel would have taken the action that . . . counsel did take." *United States v. Freixas*, 332 F.3d 1314, 1319–20 (11th Cir. 2003). Generally, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

If a legal principal is unsettled, counsel is not deficient "for an error in judgment." *Black v. United States*, 373 F.3d 1140, 1144 (11th Cir. 2004). Thus, if

[2] The government argues that Diaz's counsel was not ineffective because any objection to the § 2G2.1(b)(2)(A) enhancement, or the relevant conduct supporting it, would have been meritless. *See Denson v. United States*, 804 F.3d 1339, 1342 (11th Cir. 2015) (per curiam) ("Failing to make a meritless objection does not constitute deficient performance."). In the government's view, the convicted conduct was part of Diaz's "grooming" of the victims because his behavior "was intended to and did in fact escalate from photographs of genitalia to videos of masturbation to sexual molestation." We need not consider this argument—or Diaz's related argument about the timing and the meaning of relevant conduct—since his claim fails on other grounds and we "may affirm the judgment of the district court on any ground supported by the record, regardless of whether that ground was relied upon or even considered by the district court." *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1309 (11th Cir. 2012).

an attorney could have reasonably reached the incorrect conclusion concerning an unsettled question of law, "that attorney's performance will not be deemed deficient for not raising that issue to the court." *Id.* However, "the mere absence of authority does not automatically insulate counsel's failure to object on that basis." *Gallo-Chamorro v. United States*, 233 F.3d 1298, 1304 (11th Cir. 2000). If other circuits have addressed the issue on the merits, this may indicate that a challenge "on such grounds was not wholly without precedent." *Id.*

Under U.S.S.G. § 1B1.3(a)(1)(A), "specific offense characteristics . . . shall be determined on the basis of . . . all acts and omissions committed . . . or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction."[3] The Guidelines define an offense as "the offense of conviction and all relevant conduct under § 1B1.3." *Id.* § 1B1.1, comment. (n.1(H)). Section 1B1.3(a)(1) focuses "on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense." *Id.* § 1B1.3, comment. (n.1). The background section of § 1B1.3's Commentary states that:

> [c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be

[3] Under Section 1B1.3, relevant conduct also includes those acts that occurred in "preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3(a)(1)(A). But the government's arguments focus on demonstrating that the acts that occurred during the offenses of conviction, so we have trained our focus there too.

> considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Id. § 1B1.3, comment. (backg'd).

The scope and contours of § 1B1.3(a) are not settled in this circuit. We have not defined the scope of § 1B1.3's phrase "occurred during the commission of the offense of conviction." *See id.* § 1B1.3(a)(1). But the term "'offense of conviction' is narrow[] in scope, referring only to the conduct charged in the indictment for which the defendant was convicted." *See United States v. Scroggins*, 880 F.2d 1204, 1209 n.12 (11th Cir. 1989). And while we have stated that we "broadly interpret[] the provisions of the relevant conduct guideline," *United States v. Behr*, 93 F.3d 764, 765 (11th Cir. 1996) (per curiam), we have not defined the precise scope of "relevant conduct."

Diaz and the government cite to decisions of our sister circuits which, even if they are not controlling, are relevant to this appeal. *See Gallo-Chamorro*, 233 F.3d at 1304. Diaz relies on two cases to prove that his counsel should have known that an objection to the relevant conduct would have been proper: *United States v. Wernick*, 691 F.3d 108 (2d Cir. 2012) and *United States v. Schock*, 862 F.3d 563 (6th Cir. 2017). In *Wernick*, the defendant was convicted of receiving, distributing, reproducing for distribution, and possessing child pornography, as well as for enticing minors to engage in sexual activity. *Wernick*, 691 F.3d at 110. Like Diaz, Wernick's sentence was enhanced and the enhancement was supported

by what the district court considered relevant conduct: that Wernick had previously molested four young children. *See id.* at 111–13. But the Second Circuit reversed because "[o]ne criminal act does not become 'relevant' to a second act under the Guidelines by the bare fact of temporal overlap. . . . Without proof of a *connection* between the acts, the second event is literally a coincidence." *Id.* at 115. A similar result was reached in *Schock*. *See* 862 F.3d at 569 (interpreting the relevant conduct provision in § 1B1.3(a)(1) and determining that because "Schock's exploitation of Victim 1 . . . did not occur until almost a year after the commission of the offense of conviction . . . the government [did] not establish[] that Schock's conduct with respect to Victim 1 occurred during the commission of the offense of conviction").

The government relies on different cases to support its theory that a reasonable attorney could conclude that the § 2G2.1(b)(2) enhancement was properly applied. Most relevant to our inquiry is another Second Circuit decision, *United States v. Ahders*, 622 F.3d 115 (2d Cir. 2010) (per curiam). In that case, the defendant was convicted of one count of producing child pornography involving a male minor, EM. *Id.* at 117. The PSR included facts regarding the molestation of two separate victims—VB and BB—and recommended enhancing the defendant's sentence under § 2G2.1(d)(1). *Id.* The Second Circuit held that the "conduct involving [the other victims] occurred during the commission of the offense of

conviction, as it occurred during the period that [the defendant] was producing pornographic images and film of EM." *Id.* at 120 (internal quotation marks omitted). The Second Circuit stated that, because the defendant produced pornographic images of EM and BB together during a sleepover, the molestation of VB and BB was relevant conduct that the district court properly considered. *Id.*

In our view, these cases demonstrate that the interpretation of relevant conduct under § 1B1.3(a)(1) is unsettled across the circuits; they are a mixed bag of conflicting and non-binding law that would not have provided Diaz's trial counsel with a clear definition of relevant conduct. Of the cases Diaz cites, only *Wernick*, which required "proof of a *connection* between the acts," supports his contention that trial counsel should have known to object to the definition of relevant conduct based on the decisions of other circuits.[4] *See Wernick*, 691 F.3d at 116. But a single decision from a non-binding circuit is not enough to show that trial counsel was deficient for failing to object to an enhancement when the interpretation of the scope of that enhancement was unsettled law in the Eleventh Circuit. *Cf. Gallo-Chamorro*, 233 F.3d at 1304.

[4] Though Diaz relies primarily on *Schock* to support his claim that counsel was deficient for not looking to other circuits, the Sixth Circuit decided *Schock* in 2017, well after Diaz's sentencing. *See generally Schock*, 862 F.3d at 563. Obviously, trial counsel could not be expected to have known the conclusions of the *Schock* decision.

In short, we refuse to find counsel deficient for a mere error in judgment concerning unsettled law. *See Black*, 373 F.3d at 1144. To hold otherwise would violate our oft-stated principle that "[r]easonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop." *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994).

So, because the scope of relevant conduct was, and arguably still is, unsettled, Diaz has not shown that his trial counsel was deficient. *See Strickland*, 466 U.S. at 687. And because Diaz has failed to show deficiency, we affirm without addressing the issue of prejudice. *See Holladay*, 209 F.3d at 1248.

II.

Diaz's other claim is that his counsel was deficient for failing to effectively consult him about whether to appeal his sentence and for failing to file a notice of appeal. He argues that the district court erred when it rejected this claim without conducting an evidentiary hearing.

We review a district court's denial of an evidentiary hearing in a § 2255 proceeding for an abuse of discretion. *Rosin v. United States*, 786 F.3d 873, 877 (11th Cir. 2015). "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows

improper procedures," or clearly errs in making its factual findings. *Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014).

If a defendant requests his counsel to file a notice of appeal, and his counsel fails to do so, then counsel has acted in a "professionally unreasonable manner." *Thompson v. United States*, 504 F.3d 1203, 1206 (11th Cir. 2007). Further, "counsel generally has a duty to consult with the defendant about an appeal." *Id.* District courts are not required to hold an evidentiary hearing in a § 2255 proceeding where the files and records of the case conclusively show that the movant is not entitled to relief. 28 U.S.C. § 2255(b); *Rosin*, 786 F.3d at 877. Evidentiary hearings are also unnecessary when the movant's allegations are based on unsupported generalizations or are patently frivolous. *Winthrop-Redin*, 767 F.3d at 1216. However, district courts should grant an evidentiary hearing and rule on the merits of a movant's claim if he alleges "reasonably specific, non-conclusory facts that, if true, would entitle him to relief." *Id.*

Here, Diaz has not presented sufficient evidence showing that his counsel failed to consult with him about his appellate rights. Rather than elaborating on any discussions he had with counsel, he presents only a single factual assertion in his affidavit: that he "was never advised by [his] previous attorneys as to the nature of the appeals process and what claims could be raised in . . . a direct appeal."

This conclusory statement, absent any reasonably specific facts, is insufficient to warrant an evidentiary hearing. *See Winthrop-Redin*, 767 F.3d at 1216.

Because Diaz did not present the district court with sufficient evidence showing that his trial counsel failed to consult with him about his appellate rights, he has consequently failed to show that the district court abused its discretion in failing to hold an evidentiary hearing. *See Rosin*, 786 F.3d at 877. Therefore, we affirm on this issue.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

v. **Case No. 1:14cr15-MW/GRJ**

JOSEPH MICHAEL DIAZ,

Defendant/Petitioner.
_____/

ORDER ACCEPTING REPORT AND RECOMMENDATION

This Court has considered, without hearing, the Magistrate Judge's Report and Recommendation, ECF No. 68, and has also reviewed *de novo* Petitioner's objections to the report and recommendation, ECF No. 72. Accordingly,

IT IS ORDERED:

The report and recommendation is **accepted and adopted**, over Petitioner's objections, as this Court's opinion. The Clerk shall enter judgment stating, "Petitioner's Motion by a Person in Federal Custody to Set Aside/Vacate a Sentence of Imprisonment Pursuant to 28 U.S.C. § 2255, ECF No. 58, is **DENIED**. A Certificate of Appealability is **DENIED**." The Clerk shall close the file.

SO ORDERED on December 7, 2018.

s/Mark E. Walker
Chief United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA

VS CASE NO. 1:14-cr-15-MW-GRJ-1

JOSEPH MICHAEL DIAZ

JUDGMENT

Petitioner's Motion by a Person in Federal Custody to Set Aside/Vacate a Sentence of Imprisonment Pursuant to 28 U.S.C. § 2255, ECF No. 58 , is DENIED. A Certificate of Appealability is DENIED.

JESSICA J. LYUBLANOVITS
CLERK OF COURT

December 10, 2018
DATE

s/ KELLI MALU
Deputy Clerk: Kelli Malu

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

v. Case Nos.: 1:14cr15/WTH/GRJ
1:16cv134/WTH/GRJ

JOSEPH MICHAEL DIAZ,

Petitioner.

REPORT AND RECOMMENDATION

Petitioner Joseph Michael Diaz has filed a Motion by a Person in Federal Custody to Set Aside/Vacate a Sentence of Imprisonment Pursuant to 28 U.S.C. § 2255. (ECF No. 58.) The Government filed a response in opposition, and Petitioner filed a reply. (ECF Nos. 64, 66.) After a careful review of the record and the arguments presented, the Court concludes that Petitioner's motion should be denied.

BACKGROUND and ANALYSIS

In June of 2014, a grand jury indicted Petitioner on six counts of the production of child pornography in violation of 18 U.S.C. § 2251 (a), § 2251 (e) & 2. (ECF No. 1.) On September 8, 2014, Petitioner pleaded guilty

pursuant to a written plea agreement to Counts One and Two of the indictment, which charged him with production of child pornography. (ECF No. 24.) The Government dismissed the remaining four counts of the indictment. The plea agreement included a Statement of Facts. (ECF No. 25.) Briefly stated, Petitioner was a teacher and swim coach in Gainesville, Florida, and five members of his swim team "admitted to engaging in various forms of sexual activity that was either videoed or photographed" as part of an initiation into a club led by Petitioner. (*Id.* at 1.) This initiation involved three levels: (1) exposing their penises to Petitioner; (2) using Petitioner's phone to take a nude photo of themselves; and (3) using Petitioner's phone to record a video of themselves masturbating. Pursuant to a search warrant, law enforcement found various cell phones and computer hard drives belonging to Petitioner which contained pornographic images of the members of the swim team who were initiated into Petitioner's club. Counts One and Two of the Indictment referenced three of these victims, each of whom were over 12 years of age, but younger than 16.

A Presentence Investigation Report ("PSR") was prepared and amended four times. (ECF Nos. 30, 31, 37, 40.) The Final PSR stated that

in addition to the charged conduct, law enforcement found 1,215 child pornography videos on Petitioner's computers that appeared to depict exploitation of children, typically ranging in age "from possibly around the 4 to 5 year range up to the teenage range." (ECF No. 40, PSR ¶ 19.) Also found on Petitioner's computers were a minimum of 9,725 child pornography images, which did not reflect all the child pornography images stored ("The quantity of images was so great that not all were documented for the purpose of the forensic report."). (PSR ¶ 23.)

The PSR calculated the base offense level for each count at 32, with each count carrying a minimum sentence of 15 years' imprisonment and a maximum sentence of 30 years. (PSR ¶¶ 33, 98.) One two-level enhancement was added to the base offense level because the offense involved minors between 12 and 15 years of age; a second two-level enhancement was added because the offense involved the commission of a sexual act or contact; and a final two-level enhancement was added because the minors were entrusted to Petitioner's care as their swim coach. (PSR ¶¶ 34-36.) Thus, the adjusted offense level was 38 for each count. A multiple count adjustment of two levels was made pursuant to United States Sentencing Guideline ("U.S.S.G.") § 3D1.4, raising the total

offense level to 40. (PSR ¶¶ 50-53.) Finally, a five-level Chapter 4 enhancement was added under § 4B1.5(b) for Petitioner's engaging in a "pattern of activity involving prohibited sexual conduct." (PSR ¶ 54.) This adjusted offense level of 45 was reduced by three levels for acceptance of responsibility and for timely resolution of the case. (PSR ¶¶ 55-56.) Accordingly, based on a total offense level of 42 and a criminal history category of I, the recommended Sentencing Guideline range was 360 months' imprisonment to life on each count. (PSR ¶ 99.) On March 12, 2015, the court sentenced Petitioner to 360 months' imprisonment on each count, to run consecutively, followed by supervision for life. (ECF No. 42.) Petitioner did not appeal his sentence. Petitioner filed his timely § 2255 motion on March 25, 2016.

General Standard of Review

Collateral review is not a substitute for direct appeal, and therefore the grounds for collateral attack on final judgments pursuant to § 2255 are extremely limited. A prisoner is entitled to relief under section 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. *See* 28

U.S.C. § 2255(a); *McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "Relief under 28 U.S.C. § 2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations omitted). The "fundamental miscarriage of justice" exception recognized in *Murray v. Carrier*, 477 U.S. 478, 496 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent . . . ."

The law is well established that a district court need not reconsider issues raised in a section 2255 motion which have been resolved on direct appeal. *Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014); *Rozier v. United States*, 701 F.3d 681, 684 (11th Cir. 2012); *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000); *Mills v. United States*, 36 F.3d 1052, 1056 (11th Cir. 1994). Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under section 2255. *Nyhuis*, 211 F.3d at 1343 (quotation omitted). Broad discretion is afforded to a court's determination of whether

a particular claim has been previously raised. *Sanders v. United States*, 373 U.S. 1, 16 (1963) ("identical grounds may often be proved by different factual allegations . . . or supported by different legal arguments . . . or couched in different language . . . or vary in immaterial respects").

Furthermore, a motion to vacate under section 2255 is not a substitute for direct appeal, and issues which could have been raised on direct appeal are generally not actionable in a section 2255 motion and will be considered procedurally barred. *Lynn*, 365 F.3d at 1234-35; *Bousley v. United States*, 523 U.S. 614, 621 (1998); *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011). An issue is "'available' on direct appeal when its merits can be reviewed without further factual development." *Lynn*, 365 F.3d at 1232 n.14 (quoting Mills, 36 F.3d at 1055). Absent a showing that the ground of error was unavailable on direct appeal, a court may not consider the ground in a section 2255 motion unless the petitioner establishes (1) cause for not raising the ground on direct appeal, and (2) actual prejudice resulting from the alleged error, that is, alternatively, that he is "actually innocent." *Lynn*, 365 F.3d at 1234; *Bousley*, 523 U.S. at 622 (citations omitted). To show cause for procedural default, a petitioner must show that "some objective factor external to the defense prevented [him] or

his counsel from raising his claims on direct appeal and that this factor cannot be fairly attributable to [petitioner's] own conduct." *Lynn*, 365 F.3d at 1235. A meritorious claim of ineffective assistance of counsel can constitute cause. *See Nyhuis*, 211 F.3d at 1344.

Ineffective assistance of counsel claims are generally not cognizable on direct appeal and are properly raised by a § 2255 motion regardless of whether they could have been brought on direct appeal. *Massaro v. United States*, 538 U.S. 500, 503 (2003); *see also United States v. Franklin*, 694 F.3d 1, 8 (11th Cir. 2012); *United States v. Campo*, 840 F.3d 1249, 1257 n.5 (11th Cir. 2016). In order to prevail on a constitutional claim of ineffective assistance of counsel, a petitioner must demonstrate both that counsel's performance was below an objective and reasonable professional norm and that he was prejudiced by this inadequacy. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000); *Darden v. United States*, 708 F.3d 1225, 1228 (11th Cir. 2013). In applying *Strickland*, the court may dispose of an ineffective assistance claim if a petitioner fails to carry his burden on either of the two prongs. *Strickland*, 466 U.S. at 697; *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) ("[T]he court need not address the performance

prong if the defendant cannot meet the prejudice prong, or vice versa."). In determining whether counsel's conduct was deficient, this court must, with much deference, consider "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688; *see also Dingle v. Sec'y for Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007). Reviewing courts are to examine counsel's performance in a highly deferential manner and "must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Hammond v. Hall*, 586 F.3d 1289, 1324 (11th Cir. 2009) (quoting *Strickland*, 466 U.S. at 689); *see also Chandler v. United States*, 218 F.3d 1305, 1315-16 (11th Cir. 2000) (discussing presumption of reasonableness of counsel's conduct); *Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989) (emphasizing that petitioner was "not entitled to error-free representation"). Counsel's performance must be evaluated with a high degree of deference and without the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. To show counsel's performance was unreasonable, a petitioner must establish that "no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) (citations omitted); *Chandler*,

218 F.3d at 1315. "[T]he fact that a particular defense ultimately proved to be unsuccessful [does not] demonstrate ineffectiveness." *Chandler*, 218 F.3d at 1314. When reviewing the performance of an experienced trial counsel, the presumption that counsel's conduct was reasonable is even stronger, because "[e]xperience is due some respect." *Id.* at 1316 n.18.

Regarding the prejudice requirement, a petitioner must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (quoting *Strickland*). For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993). A petitioner therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 369 (quoting *Strickland*, 466 U.S. at 687). To establish ineffective assistance, a petitioner must provide factual support for his contentions regarding counsel's performance. *Smith v. White*, 815

F.2d 1401, 1406-07 (11th Cir. 1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *See Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1333-34 (11th Cir. 2012).

The law is well-established that counsel is not ineffective for failing to preserve or argue a meritless claim. *Denson v. United States*, 804 F.3d 1339, 1342 (11th Cir. 2015) (citing *Freeman v. Attorney General, Florida*, 536 F.3d 1225, 1233 (11th Cir. 2008)). This is true regardless of whether the issue is a trial or sentencing issue. *See*, *e.g.*, *Sneed v. Fla. Dep't of Corr.*, 496 F. App'x 20, 27 (11th Cir. 2012) (failure to preserve meritless Batson claim not ineffective assistance of counsel); *Lattimore v. United States*, 345 F. App'x 506, 508 (11th Cir. 2009) (counsel not ineffective for failing to make a meritless objection to an obstruction enhancement); *Brownlee v. Haley*, 306 F.3d 1043, 1066 (11th Cir. 2002) (counsel was not ineffective for failing to raise issues clearly lacking in merit); *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) (counsel not ineffective for failing to object to "innocuous" statements by prosecutor, or accurate statements by prosecutor about effect of potential sentence); *Meeks v. Moore*, 216 F.3d 951, 961 (11th Cir. 2000) (counsel not ineffective for

failing to make meritless motion for change of venue); *Jackson v. Herring*, 42 F.3d 1350, 1359 (11th Cir. 1995) (counsel need not pursue constitutional claims which he reasonably believes to be of questionable merit); *United States v. Winfield*, 960 F.2d 970, 974 (11th Cir. 1992) (no ineffective assistance of counsel for failing to preserve or argue meritless issue); *Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989) (counsel was not ineffective for informed tactical decision not to make what he believed was a meritless motion challenging juror selection procedures where such a motion has never been sustained because such a motion would not have been successful).

An evidentiary hearing is unnecessary when "the motion and files and records conclusively show that the prisoner is entitled to no relief." *See* 28 U.S.C. § 2255(b); *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008). Not every claim of ineffective assistance of counsel warrants an evidentiary hearing. *Gordon*, 518 F.3d at 1301 (citing *Vick v. United States*, 730 F.2d 707, 708 (11th Cir. 1984)). To be entitled to a hearing, a petitioner must allege facts that, if true, would prove he is entitled to relief. *See Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015). A hearing is not required on frivolous claims, conclusory allegations

unsupported by specifics, or contentions that are wholly unsupported by the record. *See Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014) (explaining that "a district court need not hold a hearing if the allegations [in a § 2255 motion] are . . . based upon unsupported generalizations") (internal quotation marks omitted); *Peoples v. Campbell*, 377 F.3d 1208, 1237 (11th Cir. 2004). Even affidavits that amount to nothing more than conclusory allegations do not warrant a hearing. *Lynn*, 365 F.3d at 1239. Finally, disputes involving purely legal issues can be resolved by the court without a hearing. The undersigned finds that an evidentiary hearing is not warranted in this case.

Petitioner's Claims

Petitioner raises nine claims of ineffective assistance of trial counsel in his motion. The Government argues that all but one of Petitioner's claims are procedurally defaulted because he failed to raise them on direct appeal. (*See* ECF No. 64 at 3-5.) Petitioner replies that his claims are not procedurally defaulted because a defendant generally cannot raise claims of ineffective assistance of counsel on direct appeal. (*See* ECF No. 66 at 2-3.) The undersigned agrees that Petitioner's ineffective assistance of

counsel claims are not procedurally defaulted, so they will be reviewed on the merits. *See Massaro v. United States*, 538 U.S. 500 (2003).

Ground One—Ineffective Assistance of Counsel in Failing to Object to Sentencing Enhancement Under U.S.S.G. § 2G2.1(b)(2)

Petitioner's base offense level was increased by two points pursuant to U.S.S.G. § 2G2.1(b)(2) because the offense involved the commission of a sexual act or sexual contact on a minor over twelve years but under sixteen years. (ECF No. 40, PSR ¶ 35.) The Final PSR based the enhancement on Petitioner masturbating "in front of the victims and at times would have the victims masturbate themselves and/or each other while he watched." (PSR ¶ 35.) Petitioner argues that his counsel failed to understand what conduct constituted the "relevant conduct" that the court could consider in enhancing his sentence under this provision. Consequently, he argues that his counsel was ineffective in failing to object to the application of this enhancement. (ECF No. 58 at 10-13.) Specifically, Petitioner alleges that there was no factual basis for the allegation that he masturbated in front of the victims or had them masturbate themselves and there was insufficient evidence that he committed these acts in preparation for or during the commission of the

offenses of conviction. He argues that the absence of this enhancement would have lowered his total offense level to 40, thus lowering the Guideline range to between 292 and 365 months' imprisonment.

Under U.S.S.G. § 2G2.1(b)(2), the term "sexual act" includes, "contact between the mouth and the penis" and "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(2)(b) & (d); § 2G2.1(b)(2) cmt. n.2. The term "sexual contact" means "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(3). The Final PSR contained facts which meet these definitions. Paragraph 14 states as follows:

> One of the victims reported that between June 2013 and December 2013, the defendant forced the victim to take nude pictures of himself and that the defendant masturbated the victim (unknown amount of times). This victim reported that the defendant masturbated in front of the victim's residence and that the defendant made the victim masturbate another victim (also under the age of 16) while the defendant watched. . . .

> Another victim reported that the defendant began engaging in inappropriate activities with him when the victim was 10 years old. The victim advised the defendant initially began by touching the victim's penis while they were watching television. This quickly escalated over the next six months to where the defendant would take the victim's clothes off and would touch the victim's penis with his hands and mouth. The victim described two (2) incidents, in detail, one when he was 10 years old and one that occurred around March 23, 2014.

(ECF No. 40, PSR ¶ 14.) Petitioner did not object to these factual statements in the PSR, and the sentencing court accepted the Final PSR as true and accurate. (*See* ECF No. 47 at 40.)

U.S.S.G. § 1B1.3(a)(1) defines "relevant conduct" as "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." However, relevant conduct under U.S.S.G. § 1B1.3 is not limited to the conduct charged in the indictment, and a district court may evaluate relevant conduct not included in the indictment for purpose of sentencing. *See United States v. Ignancio Munio*, 909 F.2d 436, 438 (11th Cir. 1990).

A sentencing court may consider "conduct underlying [an] acquitted charge," *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam), as well as conduct alleged in counts dropped by the Government pursuant to a plea agreement. *See United States v. Scroggins*, 880 F.2d 1204, 1211 (11th Cir. 1989) (applying prior version of Guidelines). Courts interpret relevant conduct broadly. *See United States v. Behr*, 93 F.3d 764, 765 (11th Cir. 1996).

Petitioner argues that relevant conduct must be based on acts committed in preparation for or during the offense of conviction only. However, Petitioner had notice that the court could consider more facts in determining his sentence. During his plea colloquy, the court asked Petitioner the following question:

> Under the plea agreement certain counts will be dismissed. But do you understand that under the current law and the Sentencing Guidelines, that even though these counts are going to be dismissed by the government at the time of your sentencing, this Court is still required to take into account all of the facts pertaining to your involvement in this case when considering the sentence, including the charges which are to be dismissed?

(ECF No. 51 at 16.) Petitioner answered in the affirmative. Additionally, Petitioner had notice of the conduct upon which the Government relied in supporting the enhancement at issue here. In the Addendum to the Fourth

and Final PSR, the probation officer relied on the following information as relevant conduct which was used to determine the recommended Guideline sentence:

> The number of victims identified, even though the counts may be dismissed, are part of relevant conduct and were used to determine the appropriate guideline sentence in this case. According to the Case Supplement Report provided by [AUSA], Frank Williams, one of the victims (Victim #3) met Diaz when he was 7 years old, as Diaz coached Victim #3's older sister. He joined Diaz's swim group when he was 11 years old. This victim stated that in June or July 2013, he took nude photos and recorded himself "jacking off" at Diaz's request almost daily. Additionally, according to Eighth Judicial Circuit Arrest Affidavit, Victim JK, who was 13 years old at the time the report was taken, stated that he was approximately 10 years old when the defendant began engaging in inappropriate activities with him. Because these specific victims may not be the victims cited in the counts to which the defendant pled, they are considered relevant conduct, and as such, their ages are taken into consideration when applying the specific offense characteristic.

(ECF No. 40 at 22.)

Petitioner points to an exchange which occurred at his first sentencing hearing held in December of 2014, which was continued based on some confusion about the age of one of the victims in the case. Petitioner's counsel Timothy Jansen objected to a victim identified in the PSR as "JK," who was not part of the indictment, but was involved in a

separate State of Florida case.[1] Counsel stated, "we understand the relevant conduct for charges that are dismissed and didn't object. We understand that that's relevant conduct. But when the relevant conduct is not dismissed conduct, and the child is not, was never part of this investigation, was never part of the indictment, we don't believe that that should be considered as relevant conduct." (ECF No. 52 at 4.)

The Government disputed that relevant conduct was limited to charges which were dismissed, arguing that "it relates to all criminal conduct that relates to the charges that are before the Court . . . . (*Id*. at 5.) Other than accepting the Final PSR as true and accurate, the court did not specifically address the relevant conduct which it considered in applying the enhancement under U.S.S.G. § 2G2.1(b)(2). Irrespective of counsel's argument that relevant conduct should be limited to dismissed charges, the court could consider uncharged conduct in enhancing Petitioner's

[1] Petitioner was charged in state court with offenses including one count of sexual battery on a person under 12 years of age; one count of lewd or lascivious behavior-molestation on a person under 12 years of age; lewd and lascivious battery on a person under 16 years of age; lewd or lascivious battery on a person under 16 years of age; lewd or lascivious molestation on a person between 12 and 16 years old. (*See* ECF No. 40, PSR ¶¶ 66-67; Case No. 2014 CF 1492A, Alachua County, Florida.) These charges were not prosecuted after the sentence was imposed in the federal case.

sentence. Therefore, Petitioner's counsel's failure to raise an objection to the enhancement based on relevant conduct is without merit. *See Denson v. United States*, 804 F.3d 1339, 1342 (11th Cir. 2015) (stating that the failure to raise "a meritless objection does not constitute deficient performance"). Petitioner is not entitled to relief on this ground.

Ground Two-- Ineffective Assistance of Counsel in Failing to Object to Child Pornography Production Guidelines in General and As Applied to His Case

In his second ground for relief Petitioner alleges that his counsel was ineffective in failing to object to his sentence based on the ground that U.S.S.G. § 2G2.1 overstates the seriousness of the offenses for which he was convicted in general and as applied specifically to his case. (ECF No. 58 at 13-18.) Petitioner argues that between 2004 and 2011, the number of child pornography production cases sentenced within the Guideline range dropped from 84% to 50.4%, allegedly reflecting concern about the harshness of the Guideline range. He also argues that in his case, the Guideline range is not empirically based. Petitioner believes that his case is different from other cases because his victims were "neither extremely young, nor were they subjected to violent or sadistic conduct;" the images do not depict him in any explicit sexual conduct with the victims; and the

images were not distributed and were not intended for distribution. (ECF No. 58 at 18.)

Petitioner argues the child pornography Guidelines are not the product of the Sentencing Commission's usual empirically grounded procedures and thus are entitled to far less weight than the typical guideline provision under *Kimbrough v. United States*, 552 U.S. 85 (2007) (holding district court does not abuse its discretion by concluding that Sentencing Guidelines' crack cocaine/powder cocaine disparity, which treats every gram of crack cocaine as equivalent to greater quantity of powder cocaine, yields sentence "greater than necessary" to achieve sentencing statute's objectives in particular case).

At the time of Petitioner's sentencing, the Eleventh Circuit had already established that the Guidelines for child pornography offenses "do not exhibit the deficiencies the Supreme Court identified in *Kimbrough*." *United States v. Pugh*, 515 F.3d 1179, 1201 n. 15 (2008) (dicta); *see also United States v. Irey*, 612 F.3d 1160, 1203 (11th Cir. 2010); *United States v. Wayerski*, 624 F.3d 1342 (11th Cir. 2010); *United States v. Cuellar*, 617 F. App'x 966, 971 (11th Cir. 2015) (stating "*Kimbrough* concluded that a district court may—but is not required to—deviate from the guidelines in a

crack cocaine case because the crack/powder disparity might yield a sentence greater than necessary to achieve the purposes of § 3553(a), not that the district court must lower a sentence when the guideline is not supported by empirical data.") (upholding a 210-month Guidelines sentence where the district court declined to downwardly vary). Given the foregoing, counsel was not ineffective for failing to raise an objection as to the inherent reasonableness of the child pornography Guidelines. Petitioner is not entitled to relief on this ground.

Ground Three—Ineffective Assistance of Counsel in Failing to Object that Sentence was Greater than Necessary to Achieve Sentencing Goals

In his third ground for relief Petitioner argues that his sentence was substantively unreasonable, and his counsel was ineffective in failing to object to the sentence on the ground that the sentence was greater than necessary to comply with the purposes of 18 U.S.C. § 3553(a).

A sentence may be substantively unreasonable if it does not achieve the purposes of sentencing as set forth in § 3553(a). *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). Section 3553(a) requires the sentencing court to impose a sentence "sufficient, but not greater than necessary" to reflect the seriousness of the offense, promote respect for

the law, provide just punishment for the offense, deter criminal conduct, protect the public from future criminal conduct by the defendant, and provide the defendant with necessary educational or vocational training or medical care. *See* 18 U.S.C. § 3553(a)(2). The sentencing court must also consider the § 3553(a) factors in determining a particular sentence. *See* 18 U.S.C. § 3553(a)(1), (3)-(7).[2] In explaining the sentence imposed, an acknowledgment by the district court that it has considered the defendant's arguments and the factors in section 3553(a) is enough. *See United States v. Talley*, 431 F.3d 784, 786 (11th Cir. 2005). The district court is not required to explicitly state that it has considered each of the § 3553(a) factors. *See United States v. Scott*, 426 F.3d 1324, 1329 (11th Cir. 2005). The burden of establishing that the sentence is unreasonable in light of the

[2] In arriving at a reasonable sentence, the district court is required to consider the factors set out in 18 U.S.C. § 3553(a):

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) the need to protect the public; (5) the need to provide the defendant with needed educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims.

record and the § 3553(a) factors lies with the party challenging the sentence. *See Talley*, 431 F.3d at 788. Although a sentence within the advisory guidelines range is not per se reasonable, the Eleventh Circuit has stated "we ordinarily will expect that choice to be a reasonable one." *See id*. at 787–88.

> In imposing Petitioner's sentence, the court stated the following:
>
> The sentence is within the guideline range. It is below the maximum sentence but it is imposed to take into account the dismissed or uncharged conduct. A search of the defendant's computers and hard drives revealed over 9,700 child pornography images to include child bondage images and over 1,300 child pornography videos. I have considered 18 U.S.C. 1835 (a) [*sic*] factors and the applicable guidelines and policy statements.

(ECF No. 47 at 40.) Petitioner attempts to minimize the seriousness of his crimes, stating that his conduct was "inducing boys to take photos of themselves holding their erect penis;" however, he acknowledges that aggravation in the case included "the age of the victims, the abuse of trust, sexual conduct, multiple victims and a pattern of sexual misconduct." (ECF No. 58 at 20.) Petitioner believes that his sentence should have been lower given that he had no prior criminal history; his work history was exemplary; he did not have any other reports of misconduct; and he was truly remorseful.

However, a review of the factual allegations in the Final PSR, which were uncontested by Petitioner, paint a picture of serious criminal conduct, including that Petitioner propositioned one of the victims to engage in sexual activity; masturbated one victim an unknown amount of times; and "touch[ed] the victim's penis with his hands and mouth." (PSR ¶¶ 13-14.) The Eleventh Circuit has stated that "[c]hild sex crimes are among the most egregious and despicable of societal and criminal offenses, and courts have upheld lengthy sentences in these cases as substantively reasonable." *United States v. Sarras*, 575 F.3d 1191, 1220 (11th Cir. 2009) (upholding a 1,200-month sentence for production and possession). In his motion, Petitioner does not address the quantity or content of the pornographic pictures and videos found in his possession. Given the totality of the circumstances, Petitioner has not demonstrated that his sentence was substantively unreasonable.

Finally, U.S.S.G. § 5G1.2(d) provides for the imposition of consecutive sentences under the circumstances in this case. That section states, "[i]f the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but

only to the extent necessary to produce a combined sentence equal to the total punishment." U.S.S.G. § 5G1.2(d). Here, the "total punishment" under the Sentencing Guidelines called for life imprisonment, and yet the statutory maximum for the count with the highest maximum was 30 years. Thus, the district court properly followed § 5G1.2 by imposing the sentences for multiple counts consecutively in these circumstances. *See United States v. Davis*, 329 F.3d 1250, 1253-54 (11th Cir. 2003) (upholding the imposition of consecutive sentences under § 5G1.2(d) of the Sentencing Guidelines); (ECF No. 40, PSR ¶ 99.) Petitioner has not shown that his counsel rendered ineffective assistance in failing to raise an objection that his sentence was substantively unreasonable. The court calculated the Guideline range correctly, considered the factors set out in § 3553(a) and referenced the findings in the PSR. Petitioner is not entitled to relief on this ground.

Ground Four: Ineffective Assistance of Counsel in Failing to Object to Application of the Enhancement Pursuant to USSG § 4B1.5(b)(1)

The district court applied a five-level Chapter Four enhancement to Petitioner's sentence for engaging in a pattern of activity involving prohibited sexual conduct. *See* § 4B1.5(b)(1). Petitioner argues that the

court improperly imposed this enhancement because the Statement of Facts supporting his plea agreement establishes only one incident of production as to each of the victims named in counts one and two; thus, it does not meet the definition of "pattern of activity" and his counsel was ineffective for failing to raise this issue.

The commentary in U.S.S.G. § 2G2.2 states that a pattern of activity involving the sexual abuse or exploitation of a minor "means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct." U.S.S.G. § 2G2.2 cmt. n.1. *See United States v. Anderton*, 136 F.3d 747, 751 (11th Cir. 1998) (holding that a pattern of activity permits the sentencing court to consider "conduct unrelated to the offenses of conviction"); *United States v. McGarity*, 669 F.3d 1218, 1259 (11th Cir. 2012) ("we find that the clear commentary language of the Guidelines authorizes an offense level upward adjustment for a prior 'pattern of activity' based upon [defendant]'s sexual abuse of his daughter, notwithstanding its lack of relationship to the offense of conviction").

In Petitioner's case the court was not bound to the facts stipulated in the Statement of Facts in the plea agreement in determining whether Petitioner engaged in a pattern of activity involving the sexual exploitation of a minor. Nevertheless, the Statement of Facts state that "[f]ive of the boys [on Petitioner's swim team] admitted to engaging in various forms of sexual activity that were either videoed or photographed." (ECF No. 25 at 1.) In addition, the Statement of Facts states that John Doe #1 was photographed holding his erect penis on February 5, 2011, and May 25, 2013, John Doe #2 and John Doe #3 were photographed standing together holding their erect penises. (ECF No. 25 at 2-3.) These images were stored on Petitioner's computer hard drives. This conduct alone qualifies as a pattern notwithstanding the additional conduct recited in the PSR to which Petitioner did not object. In addition, Charles Dale, a detective with the Gainesville Police Department, testified at the sentencing hearing that he found 137 images related to the swim team that involved "the exposure of sexual organs or some kind of sexual activity." (ECF No. 47 at 27.) Petitioner's counsel acknowledged in cross-examining Mr. Dale that eight swimmers were victims in this case. (*Id*. at 28.)

Because Petitioner engaged in the sexual abuse or sexual exploitation of a minor on at least two occasions, his sentence was properly enhanced for a pattern of activity. *See McGarity*, 669 F.3d at 1259 ("in interpreting an earlier version of the same enhancement containing identical language with identical commentary, we determined that "the Sentencing Commission did not intend to limit the pattern of activity the court could consider to conduct related to the offense of conviction.") (quoting *United States v. Anderton*, 136 F.3d 747, 751 (11th Cir.1998) ("Because the [commentary] language ... clearly permits an increased offense level for conduct unrelated to the offense of conviction, the district court did not err in increasing the [defendants'] offense levels.")).

In addition, the Eleventh Circuit has determined that section 2G2.2(b)(5) does not place a time limit on what sexual abuse or exploitation a court may consider in finding a pattern of activity. *See United States v. Turner*, 626 F.3d 566, 573 (11th Cir. 2010) ("Nothing in § 2G2.2(b)(5) or its commentary suggests that the 'pattern of activity' must be temporally close to the offense of conviction."). In *Turner*, the five-level enhancement was based on a defendant's repeated sexual abuse of a child that had occurred over twenty years before. *See also United States v.*

Carter, 292 F. App'x 16, 19-20 (11th Cir. 2008) (finding pattern of activity where defendant had multiple photographs and videos of eleven different identifiable child victims, and physically touched the genitalia of two different children).

Finally, Petitioner objects that the sentencing court failed to make specific factual findings as to the pattern of activity enhancement. However, the Eleventh Circuit has stated, "a district court need not make specific findings 'where it adopts a presentence investigation report that contains specific findings and the defendant fails to request that the court make more specific findings.'" *McGarity*, 669 F.3d at 1258 (quoting *United States v. Wayerski*, 624 F.3d 1342, 1352 (11th Cir. 2010)). In Petitioner's case, the court adopted the Final PSR and Petitioner made no request for more specific findings. Petitioner has failed to demonstrate that his counsel was ineffective in failing to object to the application of this enhancement. Therefore, he is not entitled to relief on this ground.

Ground Five: Ineffective Assistance of Counsel in Failing to Object to Court's Consideration of Evidence in Mitigation

In his fifth ground for relief Petitioner alleges that the record does not reflect that the court considered the letters of support he submitted in

mitigation and that his counsel's failure to object to this procedural unreasonableness constitutes ineffective assistance of counsel.

A review of the record does not support Petitioner's claim that the court failed to consider mitigating evidence when imposing sentence. As pointed out by the Government, Petitioner referenced the letters in question during the statement he made to the court at his sentencing hearing, stating, "[y]ou've had the opportunity to read the testaments of people whose lives I have positively impacted." (ECF No. 47 at 10.) Petitioner has not offered any proof that the court did not read and consider the letters in mitigation. He has also failed to provide any specific information contained in the letters or to show that any mitigation contained in these letters was significant enough to overcome the evidence in support of his sentence. As to mitigation offered at the sentencing hearing, Petitioner testified, and among other things, expressed his remorse.

In addition, his father, Jose Diaz, testified on his behalf. (*See id*. at 12-13.) Petitioner has not demonstrated that the court failed to consider the mitigation offered in his case and has not demonstrated that his counsel was ineffective for failing to object on that basis. Petitioner is not entitled to relief on this ground.

Ground Six: Ineffective Assistance of Counsel in Failing to Prepare and Present Mitigation at Sentencing

Petitioner argues that his counsel should have prepared a sentencing memorandum in support of his request that Petitioner be sentenced to 30 years' imprisonment. He also argues that his counsel failed to present sufficient mitigation and failed to "'bring to life' the individual circumstances of the Defendant." (ECF No. 58 at 24.)

A review of the final sentencing hearing shows that the defense strategy was to acknowledge the seriousness of Petitioner's crimes but argue that a 30-year sentence was an adequate punishment based on Petitioner's lack of a criminal history. Counsel stated, "[w]e are not trying to undermine any of his conduct. We're not going to try to play fancy tricks with the guidelines or the facts. We believe a 30-year sentence is sufficient under the 3553 factors to warrant that sentence for a first-time offender under this situation." (ECF No. 47 at 6-7.) Counsel emphasized Petitioner's acknowledgment of wrongdoing. He argued that the court should consider Petitioner's whole life, his family, education and military career, stating:

> All of that is encompassed in the presentence report. And the reason they do that is to get a full picture of the person. We know what the

> bad deeds are. They have been described. They are horrendous. But we also have to look at what he did before he got to this point. And someone said it is an illness. It may be an illness, and we do have programs that try to treat people for this illness. . . . We are asking you to impose the 30 years. That's what we are asking, 30 years to run concurrently so he will serve 30 years.

(ECF No. 47 at 46.)

Petitioner has not demonstrated ineffective assistance in this ground. He has not set forth any compelling mitigation that his counsel could have, but failed to, present. While he states that character witnesses should have been called, Petitioner does not identify these witnesses by name or state what these witnesses would have said that would have been sufficiently persuasive to change the outcome of the case. (*See* ECF No. 66 at 12-13.)

Finally, Petitioner has not demonstrated that had his counsel made different arguments the outcome of the proceedings would have been different. Petitioner pleaded guilty to serious criminal offenses and as discussed *supra*, there was strong evidence of other serious relevant conduct for which he was not charged.

Finally, the Government presented compelling evidence from three of the victim's parents detailing how Petitioner violated his position of trust

and describing the traumatic and long-lasting effects his conduct had on his young victims. Petitioner has not demonstrated either deficient performance or prejudice. Petitioner is not entitled to relief on this ground.

Ground Seven: Ineffective Assistance of Counsel in Failing to Raise Objection Based on *Apprendi v. New Jersey*

In his seventh ground Petitioner argues that his counsel was ineffective in failing to argue that his constitutional rights were violated when he was sentenced based on facts other than those admitted as part of his plea agreement. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that other than the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

A sentence does not run afoul of *Apprendi* when a sentencing court imposes consecutive sentences on multiple counts so long as each sentence is within the applicable statutory maximum. *See United States v. Davis*, 329 F.3d 1250, 1254 (11th Cir. 2003); *see also United States v. Smith*, 240 F.3d 927, 930 (11th Cir. 2001) (holding that there is no *Apprendi* error where "the ultimate sentence does not exceed the aggregate statutory maximum for the multiple convictions"); *United States*

v. Sanchez, 269 F.3d 1250,1268 (11th Cir. 2001) (holding "*Apprendi* has no effect on cases in which a defendant's actual sentence falls within the range prescribed by the statute for the crime of conviction"). Petitioner could have been sentenced to life imprisonment. Instead the court sentenced him to the statutory maximum of 30 years' imprisonment for each count of conviction. Petitioner's sentence does not exceed the statutory maximum for either count. Therefore, Petitioner's counsel was not ineffective for failing to make an objection on *Apprendi* grounds because there was no *Apprendi* error. Petitioner is not entitled to relief on this ground.

Ground Eight: Ineffective Assistance of Counsel in Advising Against Filing an Appeal

In his eighth ground Petitioner argues that there were grounds to appeal his sentence, and he had no reasons not to appeal, so had he been advised to appeal he would have done so. In his motion, Petitioner does not elaborate on any discussions which he had with his counsel or recite any facts surrounding any appeal discussions he had with his attorneys. As to what grounds should have been appealed, Petitioner relies on the grounds raised in the instant motion. In his reply, Petitioner elaborates

slightly that his counsel did not explain the appeal process to him and advised him that there were no issues to appeal and attached an affidavit to that effect. (ECF No. 66 at 9 & 66-1.)

The *Strickland* test applies to a claim that a lawyer was ineffective for failing to file a notice of appeal. *See Roe v. Flores–Ortega*, 528 U.S. 470, 476–77 (2000). If a defendant specifically instructs his attorney to file a notice of appeal, a lawyer who disregards this instruction acts in a manner that is professionally unreasonable. *See Flores-Ortega,* 528 U.S. at 477 (citing *Rodriguez v. United States*, 395 U.S. 327 (1969); *Peguero v. United States*, 526 U.S. 23, 28 (1999)). Because a defendant whose lawyer fails to file an appeal upon request has been denied an entire judicial proceeding, prejudice is presumed and the defendant is entitled to a belated appeal. *Id*.; *Gomez–Diaz v. United States*, 433 F.3d 788, 792 (11th Cir. 2005).

In cases where a defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, the question whether counsel has performed deficiently by not filing a notice of appeal is analyzed as follows:

> [T]he question ... is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. We employ the term "consult" to convey

> a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered; Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. *See supra 1034–1035*. If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance.

Flores–Ortega, 528 U.S. at 478; *see also Thompson v. United States*, 504 F.3d 1203, 1207 (11th Cir. 2007). The *Flores–Ortega* Court rejected a bright-line rule that counsel must always consult with a defendant regarding an appeal:

> We instead hold that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known .... Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings.

Id., 528 U.S. at 480; *see also Devine v. United States*, 520 F.3d 1286 (11th Cir. 2008) (finding counsel had no affirmative duty to consult with defendant

about an appeal where defendant was sentenced at the bottom of the Sentencing Guidelines range after pleading guilty and waiving right to appeal); *Thompson*, 504 F.3d at 1208 (11th Cir. 2007) (defendant dissatisfied with perceived disparate sentence met burden of showing he would have wanted to appeal); *Otero v. United States*, 499 F.3d 1267 (11th Cir. 2007) (defendant who received sentence at low end of predicted guidelines range and had not expressed desire to appeal failed to show prejudice).

In cases where a defendant has not specifically instructed his counsel to file a notice of appeal, a *per se* prejudice rule does not apply. Rather, a defendant must demonstrate a reasonable probability exists that, but for counsel's deficient performance, he would have timely appealed. *Flores–Ortega*, 528 U.S. at 484, 486; *Thompson*, 504 F.3d at 1207. "Evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination." *Flores–Ortega*, 528 U.S. at 485. However, "[b]ecause a direct appeal of a federal conviction is a matter of right, *see Rodriquez v. United States*, 395 U.S. 327, 329–30 (1969), we determine whether a defendant has shown that there is a reasonable probability that

he would have appealed without regard to the putative merits of such an appeal." *Thompson*, 504 F.3d at 1208 (citing *Flores–Ortega*, 528 U.S. at 485–86; *Gomez–Diaz*, 433 F.3d at 793). With respect to the second prong of the *Strickland* test, whether counsel's deficient performance prejudiced the defendant, the *Flores-Ortega* Court held that "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Flores-Ortega*, 528 U.S. at 484. The defendant need not show the putative merits of such an appeal. *Id*. at 485-86.

In *Thompson*, in reviewing a claim that counsel had failed to consult with the defendant about his appeal, the district court found "[c]onsulting with [Thompson] for less than five minutes about his right to appeal does not equate to a failure to consult." 504 F.3d at 1207. On appeal, the Eleventh Circuit stated that the question of what equates to adequate consultation, however, is not one of duration, but of content. *Id*. It found that the content of the exchange in that case did not constitute adequate consultation because no information was provided to the defendant from which he could have intelligently and knowingly either asserted or waived

his right to an appeal, and the record was clear that no reasonable effort was made to discover defendant's informed wishes regarding an appeal. *Id*. Under these circumstances, the court found that any waiver by the defendant of his right to appeal was not knowing and voluntary. *Thompson*, 504 F.3d at 1207.

In *Otero*, *supra*, the court found that counsel had not consulted with his client, when all discussions took place prior to sentencing. However, it found that no rational defendant in Otero's position would have sought to appeal in light of the broad appeal waiver, and because Otero did not communicate to his lawyer a desire to appeal, it concluded that counsel was not under a constitutional obligation to consult with his client about an appeal.

In this case, the record reflects that the court explained to Petitioner at sentencing that he had fourteen days within which to file an appeal of his sentence. The court also advised Petitioner that if he did not have the funds to hire a lawyer to appeal, the court would consider the appointment of a lawyer to represent him without cost. (ECF No. 47 at 45-46.) Petitioner acknowledged that he understood the court's instructions.

Petitioner does not allege that he instructed his counsel to appeal and that counsel failed to follow his instructions. The remaining question is whether counsel adequately consulted Petitioner on the issue of filing an appeal. In his motion and his reply, Petitioner fails to proffer any details as to when his counsel advised him not to appeal, where this discussion took place, and what was said. He also fails to demonstrate his interest in appealing (other than making a blanket statement that he would have appealed if advised to do so) or point to any evidence in the record which reflect this interest. These failures doom his claim.

In addition, while it is not dispositive of the issue, based upon the court's review, there does not appear to be a compelling issue which counsel should have advised Petitioner to appeal. *See Cuero v. United States*, 269 F. App'x. 893, 895 (11th Cir. 2008) ("Since a rational defendant would not have been interested in an appeal in this case and the record supports the district court's finding that Cuero never indicated any interest in an appeal, trial counsel did not have a constitutional duty to consult with Cuero about an appeal. Thus, even if trial counsel insufficiently consulted with Cuero, it did not amount to ineffective assistance of counsel"). Given the record and the lack of a meritorious issue to raise on appeal, Petitioner

has not demonstrated ineffective assistance. He is not entitled to relief on this ground.

Ground Nine: Ineffective Assistance of Counsel in Advising Against Filing an Appeal as to the Restitution Judgment

In his final ground for relief, Petitioner argues that his counsel was ineffective for failing to advise him to appeal the restitution ordered in his case because the amount was too speculative. Petitioner acknowledges that his counsel objected to the amount of the restitution at the sentencing hearing as unsupported by the evidence. (*See* ECF No. 47 at 39-40.)

Petitioner's claim is not cognizable in a § 2255 motion. The Eleventh Circuit has held that a federal prisoner cannot utilize the statute governing motions to vacate to challenge a restitution order, even if cognizable claims seeking release from custody are also raised. *See Mamone v. United States*, 559 F.3d 1209 (11th Cir. 2009). In *Mamone*, the court determined that under the plain language of the statute, a prisoner must claim the right to be released from custody, and a reduction in restitution does not constitute release from custody. *Id*. at 121. Moreover, an allegation that a restitution order is erroneous because of counsel's alleged ineffective assistance of counsel does not change this result. *See also United States*

v. Segler, 37 F.3d 1131, 1137 (5th Cir. 1994) ("A convicted defendant who receives an allegedly erroneous fine because of constitutionally inadequate assistance of counsel cannot seek post-conviction relief under § 2255 and neither should a petitioner who is both fined and imprisoned have the opportunity to assert an identical fine-related claim under § 2255."). Therefore, Petitioner is not entitled to relief on this ground.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. § 2255 11(b).

After review of the record, the court finds no substantial showing of the denial of a constitutional right. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (explaining how to satisfy this showing) (citation omitted). Therefore, it is also recommended that the court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

Based on the foregoing, it is respectfully **RECOMMENDED** that:

1. Petitioner's Motion by a Person in Federal Custody to Set Aside/Vacate a Sentence of Imprisonment Pursuant to 28 U.S.C. § 2255 (ECF No. 58), should be **DENIED.**
2. A certificate of appealability should be **DENIED**.

IN CHAMBERS at Gainesville, Florida, this 13th day of September, 2018.

s/Gary R. Jones
GARY R. JONES
United States Magistrate Judge

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed within fourteen (14) days after being served a copy thereof. Any different deadline that may appear on the electronic docket is for the court's internal use only, and does not control. A

copy of objections shall be served upon all other parties. If a party fails to object to the magistrate judge's findings or recommendations as to any particular claim or issue contained in a report and recommendation, that party waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA

-vs-

JOSEPH MICHAEL DIAZ

Case # 1:14CR15-001

USM # 22974-017

Defendant's Attorneys:
R. Timothy Jansen (retained)
1206 North Duval Street
Tallahassee, Florida 32303

Steven Miles Kinsell (retained)
315 SE 2nd Avenue
Gainesville, Florida 32601

JUDGMENT IN A CRIMINAL CASE

The defendant pled guilty to Counts 1 and 2 of the Indictment on September 8, 2014. Accordingly, **IT IS ORDERED** that the defendant is adjudged guilty of such counts which involve the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 U.S.C. § 2251(a)	Production of Child Pornography	February 5, 2011	1
18 U.S.C. § 2251(a)	Production of Child Pornography	May 24, 2013	2

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, including amendments effective subsequent to 1984, and the Sentencing Guidelines promulgated by the U.S. Sentencing Commission.

Counts 3-6 are dismissed on a motion by the Government.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Date of Imposition of Sentence:
March 6, 2015

s/Maurice M. Paul
MAURICE M. PAUL, SENIOR
UNITED STATES DISTRICT JUDGE
Date 3/10/15

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **three hundred and sixty (360) months** on each of Counts 1 and 2, with said terms to run consecutively to each other, for a total sentence of **seven hundred and twenty (720) months**, and consecutively to any sentence imposed in Circuit Court, Alachua County, Florida Case Numbers 2014-CF-1476, 2014-CF-1492, 2014-CF-1928

The defendant was previously denied bond, and is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

SUPERVISED RELEASE

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

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

The defendant shall not commit another federal, state, or local crime and shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the following standard conditions that have been adopted by this court.

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. the defendant shall support his or her dependents and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. the defendant shall notify the probation officer within **72 hours** of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14. if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

15. The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

16. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

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

2. The defendant shall not own or possess, either directly or constructively, a firearm, a dangerous weapon, or destructive device.

3. The defendant shall have no contact with minor children under the age of 18 in any form, direct or indirect, including but not limited to, personally, by computer, telephone, letter, or through another person, without the approval of the probation officer. Any contact must be reported immediately to the probation officer.

4. The defendant shall not frequent locations where children under the age of 18 are likely to congregate.

5. The defendant shall neither volunteer in nor be employed by any organization or employer that would allow him access to minor children.

6. The defendant shall register with the state sex offender registration agency in any state where he resides, is employed, carries a vocation, or is a student, as directed by the supervising probation officer. The probation office will provide the state officials with any and all information required by the state sex offender registration agency and may direct the defendant to report to that agency personally for additional processing such as photographing or fingerprinting.

7. The defendant shall participate in a program of mental health counseling, to include sex offender treatment, and/or evaluation as may be directed by the probation officer. The defendant shall be required to waive his right of confidentiality while involved in treatment. The defendant may be

required to pay or contribute to the cost of services rendered based upon financial ability.

8. The defendant shall be required to submit to periodic polygraph testing and/or computer voice stress analysis (CVSA) as may be directed by the probation officer as a means to ensure that he is in compliance with the requirements of his supervision or treatment program.

9. The defendant shall permit the U.S. Probation Officer to search his person, property, house, residence, vehicle, papers, computer, other electronic communications, data storage devices or media, and the effects at any time, for the presence of child pornography.

10. The defendant will immediately cease all computer use if directed by the probation officer to search and/or investigate suspected violations of computer monitoring conditions.

11. The defendant shall not own, possess, attach or use any computer, modem, network device, software, storage media, or peripheral device which has not been made known to the probation officer. The defendant may not purchase any computer, computer components, or computer-related equipment without prior approval of the probation officer and is subject to computer monitoring as directed by the probation officer.

12. The defendant is prohibited from maintaining or creating an account on any social networking site that allows access to minor children, or allows for the exchange of sexually explicit material or chat conversations, etc. This includes any other internet sites that advertise for sexual services in the form of personal services.

13. The defendant will not use a Web Cam or any other hardware that allows for the exchange of video or photographs via a live feed or video messaging.

14. The defendant will not install new hardware, software, or effect repairs on his computer system without receiving prior permission from the probation officer.

15. The defendant will disclose and provide serial numbers to the probation officer for all data storage devices, including removable storage devices. The defendant will provide access to the storage drives for inspection by the probation officer. The defendant may not purchase new devices or dispose of any existing storage device without the prior consent of the probation officer.

16. The defendant shall not use or possess any removable storage device or cellular telephone that allows internet access without prior approval of the probation officer.

17. The defendant shall disclose all user names and password for all computer programs, including email accounts, to the probation officer. The defendant shall not create or use any email account without approval from the probation officer.

Upon a finding of a violation of probation or supervised release, I understand the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

_____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

CRIMINAL MONETARY PENALTIES

All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the Court. Payments shall be made payable to the Clerk, U.S. District Court, and mailed to 111 N. Adams St., Suite 322, Tallahassee, FL 32301-7717. Payments can be made in the form of cash if paid in person.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

SUMMARY

Special Monetary Assessment	Fine	Restitution
$200.00	**NONE**	**$624,000.00**

SPECIAL MONETARY ASSESSMENT

A special monetary assessment of **$200.00** is imposed, and is due in full immediately.

FINE

NONE

RESTITUTION

Restitution in the amount of **$624,000.00** ($78,000.00 for each victim identified in PSR) is imposed, and is due in full immediately.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise. If nominal payments are made by the defendant the court authorizes those payments to be made to the victims on a rotating basis.

The amount of loss and the amount of restitution ordered will be the same unless, pursuant to 18 U.S.C. § 3664(f)(3)(B), the court orders nominal payments and this is reflected in the Statement of Reasons page.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) special monetary assessment; (2) non-federal victim restitution; (3) federal victim restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties in full immediately

The defendant must notify the court of any material changes in the defendant's economic circumstances, in accordance with 18 U.S.C. §§ 3572(d), 3664(k) and 3664(n). Upon notice of a change in the defendant's economic condition, the Court may adjust the installment payment schedule as the interests of justice require.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. § 3664(f)(3)(A): None

Unless the court has expressly ordered otherwise above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. In the event the entire amount of monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

The defendant shall forfeit, to the United States, any interest he may have in the following property:

Compaq 2500 Laptop, Serial Number CNF3310LXV
Dell desktop Computer Opiplex 790, Tag #642VVR1
Amazon Kindle in Black Case
Fuji Film Digital Camera Finepix, Serial Number 7AA21135
HTC White Cell Phone
HTC Black Cell Phone
Samsung SPN-M930 Cell Phone
ASUS CPU Tower
Western Digital External Hard Drive, Serial Number WCASYZ870183
MassCool External Hard Drive, Serial Number ATQ090835999
Avertech Disc Drive 3.5 SATA
Ultramini Potrable Disc
Maxtor 330gSata 150 Hard Drive, Serial Number L60HLS26
Apple I-Pad, Seral Number F5XKJU30DF1
Amazon Kindle in Green Case
Apple I-Pod Touch in Black Case
Sony Play Station 3, Serial Number CE139162433CEC
Sony Play Station 3 with Controller, Serial Number AC257572954
Sony Play Station 4 with Controller, Serial Number MB061278431
Nintendo DS Game System, Serial Number CW400281566
Fuji Film XD Film Card
(2) Maxtor Hard Drives 300g SATA, Serial Numbers L60FSQPG and L60FSM9G
Panasonic DVX/100A Video Camera, Serial Number L4Td0125
Various Thumb Drives, DVC Mini Tapes, Video Tapes, Rewriteable Discs and CDR Data Discs

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-15316-CC

JOSEPH MICHAEL DIAZ,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

BEFORE: WILSON, BRANCH and FAY, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant Joseph Diaz is DENIED.

ORD-41

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF FLORIDA

United States of America, Plaintiff, v. Joseph Michael Diaz, Defendant.	Case No. 1:14CR-15-MP-GRJ AFFIDAVIT OF JOSEPH MICHAEL DIAZ

1. I am Joseph Michael Diaz and the Defendant in the above-captioned matter.
2. I was never advised by my previous attorneys as to the nature of the appeals process and what claims could be raised in either a direct appeal or motion to vacate sentence.
3. I was not personally aware of the specific legal issues pertaining to the reasonableness of the sentence itself or the United States Sentencing Guidelines calculation which could be raised on appeal. This was due to

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the fact that my attorneys never raised any objections at sentencing with respect to these issues.

4. Following the sentencing in this case, I was informed by my attorneys that there were no issues to appeal.

Signed and sworn under penalty of perjury this 22nd day of June, 2016 by:

Joseph Michael Diaz

Original of the foregoing filed
this date with the Clerk of the
U.S. District Court for the Northern District of Florida

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15316-K

JOSEPH MICHAEL DIAZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Joseph Michael Diaz, a federal prisoner, moves this Court for a certificate of appealability ("COA") in order to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate. With the assistance of counsel, Diaz seeks a COA solely on two issues:

1. Whether Diaz was denied effective assistance of counsel due to counsel's failure to object to an erroneous guideline calculation; and

2. Whether Diaz was denied effective assistance of counsel due to counsel's failure to file a notice of appeal.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted).

Diaz pleaded guilty to two counts of production of child pornography based on two explicit photographs of young boys taken on February 5, 2011, and May 25, 2013 ("Counts 1 & 2"). At sentencing, the district court applied a two-level enhancement under U.S.S.G. § 2G2.1(b)(2) for an offense involving a sexual act or sexual contact. Diaz's presentence investigation report ("PSI") based the enhancement on the unobjected-to factual statements that Diaz touched a victim's genitals between June and December 2013 and touched another victim's genitals when the victim "was 10 years old" and again some unspecified number of years later on March 23, 2014. Although it is difficult to discern from the record, it appears that the victims underlying the § 2G2.1(b)(2) enhancement were not the victims referenced in Counts 1 and 2 of the indictment.

In his § 2255 motion, Diaz argued in his first claim that his counsel was ineffective for failing to object to the § 2G2.1(b)(2) enhancement because the conduct used to support the enhancement did not occur during the commission of the offenses of conviction, in preparation for those offenses, or in the course of attempting to avoid detection or responsibility for those offenses, as required to constitute relevant conduct under U.S.S.G. § 1B1.3(a)(1)(A). Rather, Diaz argued that the conduct occurred after the offenses of conviction and was unrelated to the offenses of conviction.

Here, reasonable jurists could debate whether counsel was ineffective for not objecting to the § 2G2.1(b)(2) enhancement at sentencing on the grounds that the potentially relevant conduct did not occur "during the commission of the offense[s] of conviction" when the sexual acts and sexual contact underlying the enhancement appear to have occurred weeks to months after the photographs giving rise to Counts 1 and 2 were taken and when the conduct was different in kind than the conduct giving rise to the offenses of conviction and may have involved different

victims. *Cf. United States v. Mathews*, 874 F.3d 698, 708 (11th Cir. 2017) (holding that a defendant's prior acts occurred during the commission of a falsification-of-records offense when there was "close two-hour timing" and a "direct causal relationship" between the prior acts and the falsification of the records); *see also United States v. Ignancio Munio*, 909 F.2d 436, 438 n.2 (11th Cir. 1990) (stating that this Court interprets the term "offense of conviction," as used in the Guidelines, narrowly to refer only to the conduct charged in the indictment for which the defendant was convicted). Similarly, reasonable jurists could debate whether Diaz was prejudiced by his counsel's failure to challenge the enhancement because he was potentially subjected to a higher advisory guideline range. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016) (stating that, in most cases, a defendant who has shown that the district court applied an incorrect, higher guideline ranger has demonstrated a reasonable probability of a different outcome).

As to Diaz's second claim—that his counsel was ineffective for failing to file a notice of appeal—reasonable jurists could debate whether the district court erred in denying this claim without an evidentiary hearing. Diaz's § 2255 motion and subsequent affidavit alleged that his attorney failed to advise him about the nature of the appeals process or the advantages and disadvantages of pursuing a direct appeal, and that he would have appealed but for counsel's deficient performance. *See Thompson v. United States*, 504 F.3d 1203, 1206-07 (11th Cir. 2007) (holding that counsel was ineffective for failing to consult with a defendant about a direct appeal and where there was a reasonable probability that the defendant would have timely appealed but for counsel's failure to consult); *see also Hernandez v. United States*, 778 F.3d 1230, 1232 (11th Cir. 2015) ("A petitioner is entitled to an evidentiary hearing if he alleges facts that, if true, would entitle him to relief.") (quotation marks omitted).

Accordingly, Diaz's motion for a COA is GRANTED as to the following issues only:

1. Whether Diaz's counsel was ineffective for failing to object to the district court's application of a two-level enhancement under U.S.S.G. § 2G2.1(b)(2) on the ground that the conduct supporting the enhancement did not occur during the commission of the offenses of conviction, in preparation for those offenses, or in the course of attempting to avoid detection or responsibility for those offenses?

2. Whether the district court erred in denying, without an evidentiary hearing, Diaz's claim that his counsel was ineffective for failing to file a notice of appeal?

UNITED STATES CIRCUIT JUDGE