UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON

CRIMINAL ACTION NO. 5:15-CR-65-KKC-EBA-1

UNITED STATES OF AMERICA, PLAINTIFF,

V. **MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

CODY LEE HERMAN, DEFENDANT.

*** *** *** ***

I. INTRODUCTION

The Defendant, Cody Lee Herman, brings this action under to Title 28 United States Code § 2255 seeking to vacate, set aside, or correct his sentence. [R. 59]. Consistent with local practice, this matter is before the undersigned for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1). Having considered the record and for the reasons that follow, the Court will recommend that Herman's motion be denied.

II. FACTS AND PROCEDURAL HISTORY

Prior to June 22, 2015, a Federal Bureau of Investigation Child Exploitation Task Force Under Cover Officer (UC) posted an online advertisement on a website known to be frequented by individuals having a sexual interest in children. [R. 49 at 3]. Cody Lee Herman responded to the advertisement, indicating that he was in the beginning stages of abusing his six-year-old daughter. The UC and Herman continued to converse via Kik, an instant messaging application for mobile devices. The discussion and images shared by Herman during the conversation lead the UC to believe that Herman's daughter was in immediate danger and, on June 23, 2015, law enforcement executed the search warrant at Herman's residence. Officers confiscated his cellphone where they found

images of child pornography. In addition, they were able to determine that the images Herman shared were of his daughter taken at his home. [R. 49 at 6].

On July 24, 2015, Herman was indicted on one count of production of child pornography, in violation of 18 U.S.C. 2251(a); one count of distribution of child pornography in violation of 18 U.S.C. 2252(a)(2); and one count of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). [R. 9]. On November 17, 2015, Herman's counsel moved for a competency evaluation to address Herman's competence to stand trial as well as to address the issue of criminal responsibility, that is, the mental ability to understand the nature and wrongfulness of his alleged conduct at the time of the charged offenses. [R. 17]. The Court granted the request and Herman was sent to the Federal Medical Center in Lexington, Kentucky, for evaluation. [R. 20]. Prior to the completion of the examination attorney Gore moved to withdraw as counsel for Herman, citing differences that had arisen between the two. [R. 22; R. 24]. The Court granted the Motion and directed that replacement counsel be drawn to represent Herman. [R. 25; 30; 31]. Following completion of the competency examination a hearing was held on April 7, 2016, where H. Wayne Roberts made his first appearance in the case and was formally appointed to represent Herman. At that hearing Herman stipulated to his competence to proceed with the case as well as his competency at the time of the alleged offenses.[R. 30]. The matter was scheduled to proceed to trial on May 16, 2016. [R. 30].

On May 4, 2016, Herman moved to be re-arraigned on Count One of the indictment and, in granting the motion, the Court set aside the trial date. [R. 33]. Herman was rearraigned and pursuant to a plea agreement, [R. 36], plead guilty to Count 1 which charged him with production of child pornography in violation of 18 U.S.C. 2251(a). [R. 35; R. 52 (rearraignment transcript)]. Herman was sentenced on August 18, 2016, to 300-months imprisonment, 30-years supervised release, and a $100

special assessment. [R. 41; R. 43 (sentencing transcript); R. 44 (judgment)]. All remaining counts were dismissed. [R. 44]. Subsequently, Herman filed an appeal. [R. 45]. However, Roberts, Herman's attorney, filed an *Anders* brief and moved to withdraw as counsel citing no arguable grounds for appeal existed. [R. 55 at 2]. Based on this motion and its own independent review, the Court of Appeals granted Roberts' motion and affirmed the judgment of the District Court. [R. 55 at 7].

Herman has now filed this instant motion to vacate pursuant to 28 U.S.C. § 2255. [R. 59]. Specifically, Herman argues that both Gore and Roberts were ineffective. He claims Gore was ineffective for: (1) failing to have Herman psychologically evaluated for five months; (2) failing to properly file paperwork; and (3) withdrawing without cause. [R. 59 at 5]. He also claims Roberts was ineffective for: (1) being unavailable and failing to notify the Court of the prosecutions threats during plea negotiations; (2) failing to move for dismissal due to a Speedy-Trial violation under 18 U.S.C. § 3161 and the Sixth Amendment; (3) failing to properly file paperwork; (4) failing to mention the length of his pretrial incarceration to the judge during sentencing; (5) failing to seek a sentencing reduction under U.S.S.G. § 5K2.0; (6) failing to argue sentencing manipulation by the Government and undercover officers; and (7) improper use of an *Anders* Brief. [R. 59 at 6-7]. Herman's motion stands ripe for adjudication.

III. STANDARD OF REVIEW

Generally, a prisoner has a statutory right to collaterally attack his conviction and sentence. *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999). For a federal prisoner to prevail on such a claim, he must show that: (1) his conviction resulted from an error of constitutional magnitude; (2) his sentence was imposed outside the statutory limits; or (3) an error of fact or law occurred that was so fundamental as to render the entire proceedings invalid. *Mallett v. United States*, 334 F.3d 491,

496–97 (6th Cir. 2003), cert. denied, 540 U.S. 1133 (2004); *see also Moss v. United States*, 323 F.3d 445, 454 (6th Cir. 2003), cert. denied, 540 U.S. 879 (2003). He must sustain these allegations by a preponderance of the evidence. *McQueen v. United States*, 58 F. App'x 73, 76 (6th Cir. 2003) (unpublished) ("Defendants seeking to set aside their sentences pursuant to 28 U.S.C. § 2255 have the burden of sustaining their contentions by a preponderance of the evidence."); *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006). If the prisoner alleges a constitutional error, he must establish by a preponderance of the evidence that the error "had a substantial and injurious effect or influence on the proceedings." *Watson*, 165 F.3d at 488 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993); *Pough*, 442 F.3d at 964. Alternately, if he alleges a non-constitutional error, he must establish "a fundamental defect which inherently results in a complete miscarriage of justice . . . an error so egregious that it amounts to a violation of due process." *Watson*, 165 F.3d at 488 (citing *United States v. Ferguson*, 918 F.2d 627, 630 (6th Cir. 1990).

To prevail on an ineffective assistance of counsel claim under Section 2255, the petitioner must prove both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88. In applying this test, reviewing courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance . . ." *Id.* Second, the petitioner must establish prejudice, by showing there is a reasonable probability that, but for counsel's unprofessional errors, the result of his proceedings would have been different. *Id.* at 694–95. Notably, "[w]hen deciding ineffective-assistance claims, courts need not address both components of the [deficient performance and prejudice] inquiry 'if the

defendant makes an insufficient showing on one.'" *Campbell v. United States*, 364 F.3d 727, 730 (6th Cir. 2004); *Strickland*, 466 U.S. at 697.

Decisions that "might be considered sound trial strategy" do not constitute ineffective assistance of counsel. *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). While trial counsel's tactical decisions are not completely immune from Sixth Amendment review, they must be particularly egregious before they will provide a basis for relief. *Martin v. Rose*, 744 F.2d 1245, 1249 (6th Cir. 1984). Further, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the [ultimate] judgment." *West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996) (quoting *Strickland*, 466 U.S. at 691). "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992).

IV. ANALYSIS

This Court is obligated to broadly construe Herman's pro se Motion to Vacate, evaluating his arguments according to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). In his motion, he claims that both of his attorneys were ineffective. As addressed below, his arguments provide no grounds for relief.

A. Attorney Gore Ineffective Assistance of Counsel Claims

Herman raises three (3) ineffective assistance of counsel claims against his former attorney, Gore, in his § 2255 motion. [R. 59 at 5]. He claims Gore was ineffective for: (1) failing to have Herman psychologically evaluated for five months; (2) failing to properly file paperwork; and (3) withdrawing without cause. Upon consideration of his arguments, the record now before the Court

and based on the analysis below the undersigned will recommend that these three (3) claims be denied.

1. Failure to have Herman Psychologically or Psychiatrically Evaluated for Five Months.

Herman's first claim is that Gore was ineffective for not having him psychologically or psychiatrically evaluated sooner. [R. 59-1 at 4]. Herman was arrested and charged by complaint following the execution of the search warrant in June 2015 [R. 1]. From that time until counsel moved for a competency evaluation in November 2015, Herman contends that he waited needlessly in prison, that he was isolated and suffered from post-traumatic stress disorder (PTSD) and lost 70 pounds. [R. 59-1 at 4]. Essentially, Herman's claim is that Gore left him to "languish in jail with little to no psychiatric care." [R. 59 at 5].

Although Herman argues that counsel was ineffective during this period, he alleges no particular error or deficiency in counsel's representation. Rather, the record reflects that following the filing of a complaint, Gore appeared with Herman for an initial appearance on June 24, 2015; for preliminary and detention hearings on June 26, 2015; and for an arraignment on charges in the indictment on July 27, 2015. Then, on September 14, 2015, he moved for a continuance of the trial citing the need for time to gather medical records regarding Herman's mental health in order to fully consider whether a competency evaluation should be conducted. [R. 15]. Then, in order to allow counsel the opportunity to fully explore the possibility that Herman might not be competent to proceed or to understand the wrongfulness of his acts at the time of the events charged in the indictment, the court granted a continuance of the trial. [R. 16]. Counsel moved for a competency evaluation in November 2015. [R. 17]. Although Herman now claims that counsel was ineffective for allowing a delay to occur prior to the competency evaluation, Herman fails to support this

assertion with any factual evidence of deficient performance. A criminal defendant who is incompetent may not be tried. *Godinez v. Moran*, 509 U.S. 389, 396 (1993); *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *United States v. Newton*, 389 F.3d 631, 637 (6th Cir. 2004); *Coleman v. Mitchell*, 244 F.3d 533, 545 (6th Cir. 2001). The test of competency "'is whether [the defendant] had sufficient ability to consult with his lawyers and a reasonable degree of rational and factual understanding of the proceedings against him.'" *United States v. Denkins*, 367 F.3d 537, 547 (6th Cir. 2004) (quoting *United States v. Ford*, 184 F.3d 566, 580 (6th Cir. 1999)); *see also Godinez*, 509 U.S. at 396; *Harries v. Bell*, 417 F.3d 631, 635 (6th Cir. 2005). "[T]he standard . . . for requiring competency hearings prior to trial or the entry of a guilty plea is not merely whether extant evidence raises 'doubt' as to the defendant's capacity to stand trial, but rather whether evidence raises a 'bona fide doubt' as to a defendant's competence." *Warren*, 365 F.3d at 533 (quoting *Drope*, 420 U.S. at 173). In the present case, Herman's counsel sought a delay of the scheduled trial in order to receive and evaluate some of Herman's medical records for the stated purpose of considering whether, as required by the applicable statute, there was "reasonable cause to believe that [Herman] may presently be suffering from a mental disease or defect rendering him mentally incompetent…" 18 U.S.C. 4241(a). Herman points to no factual evidence to show that his counsel had earlier knowledge of a mental disease or defect or other grounds to move for a competency evaluation. Given the nature and the seriousness of the charges Herman faced, it is reasonable for counsel to investigate the issue of competence to determine whether there is reasonable cause to request an evaluation. The Court is mindful that to establish deficient performance, Herman must show that "counsel's representation fell below an objective standard of reasonableness," and this Court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance

. . ." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Although Herman takes issue with counsel's perceived delay in requesting a competency hearing, decisions that "might be considered sound trial strategy" do not constitute ineffective assistance of counsel. *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). Herman makes no showing of factual evidence to support his claim deficient performance due to unreasonable delay in requesting a competency hearing, and the claim should be denied.

2. Failure to Properly File Paperwork.

Herman's second ineffective assistance of counsel claim arises from counsel's motion to continue the trial, filed on September 14, 2015. [R. 15]. The Court record reflects that the document was filed as a scanned image before being converted to a pdf document. The record further reflects that the clerk of court placed a notice to counsel into the record stating that prior to filing, documents should be converted to pdf's but that no further action was required by counsel. The motion to continue was then granted by the Court three days later. [R. 18]. Herman argues that this series of events demonstrates Gore's lack of knowledge of court rules or court procedures. [R. 59-1]. Even if the Court assumes that this minor error is evidence of deficient performance, Herman fails to demonstrate how he suffered prejudice. To establish prejudice in the ineffective assistance of counsel context, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of his proceedings would have been different. *Strickland*, 466 U.S. at 694-95. The record before the court reflects no conceivable prejudice, and Herman fails to demonstrate prejudice as well. Accordingly, this claim fails to provide Herman any relief.

3. Inappropriate Withdrawal as Counsel Without Cause.

Herman's final ineffective assistance of counsel claim against Gore is that he "inexplicably withdrew as counsel," leaving Herman's legal defense "twisting without a sense of defense or

direction." [R. 59 at 5; R. 59-1 at 4]. Herman claims that Gore gave no reason for withdrawal, yet the record indicates that the reason for withdrawal was based on "differences [that had] arisen between Counsel and Defendant and Counsel believe(d) that it would be better if the Defendant (was) appointed a different attorney…Counsel believe(d) this request (was) in the best interest of the Defendant" [R. 24]. To shed further light, Gore has stated by affidavit that Herman made threats against Gore during a recorded jailhouse telephone conversation between Herman and his wife. [R. 68-1 at 3 (Gore Affidavit)]. Lastly, Gore states that he felt ethically obligated to withdraw as he was concerned that the threat would subconsciously impact his performance as Herman's attorney. *Id*. at 4.

Herman fails to show any facts to demonstrate that Gore's withdrawal was in any way improper, or that he suffered prejudice as a result. In accordance with the Court's local rules, Gore filed a timely motion, certified that the motion was served on his client, made a showing of good cause, and the Court consented to his withdrawal. [R. 24; R. 25]. Thus, Gore's withdrawal was appropriate. Herman also argues that Gore's withdrawal somehow left him without guidance. [R. 59 at 5]. However, the record reveals that in the same Order that granting leave to withdraw, the Court directed the clerk to draw a substitute appointed counsel to represent Herman. [R. 25]. Consequently, Herman was never without representation at any stage of the proceedings.

Herman has failed to overcome the strong presumption that Gore's conduct did not fall below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. Also, Herman has failed to prove prejudice because he has failed to show how Gore's withdrawal was an unprofessional error and how the result of his proceedings would have been different. *Id*. at 694-95. Therefore, this claim should be denied.

B. Attorney Roberts Ineffective Assistance of Counsel Claims

Herman raises seven (7) ineffective assistance of counsel claims against his former attorney, Roberts. [R. 59 at 6-7]. He claims Roberts was ineffective for: (1) being unavailable and failing to notify the Court of the prosecution's threats during plea negotiations; (2) failing to move to dismiss the case due to a Speedy-Trial violation under 18 U.S.C. § 3161 and the Sixth Amendment; (3) failing to properly file paperwork; (4) failing to mention the length of Herman's pretrial incarceration to the judge during sentencing; (5) failing to file for a sentencing reduction under U.S.S.G. § 5K2.0; (6) failing to argue sentencing manipulation by the Government and undercover officers; and (7) improper use of an *Anders* Brief. Upon consideration of his arguments and the record now before the Court, the undersigned will recommend that these seven (7) claims be denied.

1. Counsels unavailability and threats during plea negotiations.

Herman claims that his attorney, Roberts, was mostly unavailable and only met with him three (3) times, that their meetings were never face-to-face except for when they discussed his plea agreement, and that Roberts intimidated him into accepting the plea agreement. [R. 59-1 at 6]. Yet, the record refutes his accusations as the following . transcript illustrates:

> THE COURT: With Mr. Robert's help, have you been able to read and understand the legal documents given in this case?
>
> THE DEFENDANT: Yes, ma'am.

[R. 52, p. 5].

> THE COURT: Okay, now, Mr. Herman, were you provided with a copy of the indictment in this case? That's the list of charges that the grand jury brought against you.
>
> THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you discussed that indictment with Mr. Roberts?

THE DEFENDANT: Yes, I have, Your Honor.

[R. 52, pp.7-8].

THE COURT: Mr. Herman, your lawyer has placed in front of you a document called a plea agreement, and attached to [is] something called a sealed supplement. Do you recognize both of these documents?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you reviewed them carefully?

THE DEFENDANT: Yes, I have.

THE COURT: Do you understand them?

THE DEFENDANT: Yes, I do.

THE COURT: Did you sign them?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did anybody threaten you or force you or coerce you into signing those documents?

THE DEFENDANT: Negative, Your Honor.

THE COURT: Has anybody threatened you or tried to force you or coerce you into coming before this court to enter a plea of guilty here today?

THE DEFENDANT: Negative, Your Honor.

THE COURT: Are you willing to plead guilty to count one because you committed the conduct described therein?

THE DEFENDANT: Yes, Your Honor.

[R. 52 at 10, line 2-20].

THE COURT: Mr. Herman, let me direct your attention to paragraph 3 of your plea agreement. Paragraph 3 of your plea agreement contains a statement of facts or a description of events that the government says that it could prove and that you admit. Do you see that section?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you reviewed it carefully?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you discussed it with your lawyer?

THE DEFENDANT: Yes, I have, Your Honor.

[R. 52, p. 52, p. 14].

THE COURT: Have you discussed the Federal Sentencing Guidelines with Mr. Roberts?

THE DEFENDANT: I have, Your Honor.

[R. 52, p. 15].

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THE COURT: And finally [paragraph 13 of the plea agreement] says you understand your plea agreement, that you – your lawyer's explained it to you and you have entered into voluntarily; is that true?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has anybody tried to threaten you or force you or coerce you into coming before this court today to enter a plea of guilty?

THE DEFENDANT: No, Your Honor.

THE COURT: Now, you have a right to a trial in this case, and at a trial, the government would have to prove your guilt beyond a reasonable doubt to a jury.

> You would get to see and hear all of the government's evidence against you.
>
> You would have your lawyer to represent you, and he would cross examine all the government's evidence and challenge the introduction of documents or images.
>
> Because the government bears the burden of proof throughout the entire proceeding, you wouldn't have to call any witnesses or do anything to prove your witness - - to prove your innocence.
>
> However, if you wanted to call witnesses, the court would issue summons so the witnesses could be brought here to testify for you.
>
> Now, if I accept a plea of guilty from you here today, none of those things are going to happen and there is not going to be a trial. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you want to have a trial?

THE DEFENDANT: Negative, Your Honor.

[R. 52 at 18-20].

Herman's under oath affirmations at his re-arraignment "'constitute a formidable barrier in any subsequent collateral proceedings' because '[s]olemn declarations in open court carry a strong presumption of verity.'" *Calvey v. Burt*, No. 1-1926, 2018 WL 2015779, at *3 (6th Cir. April 30, 2018) (citing *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977)). Herman claims that his counsel was unavailable, that he did not understand the plea agreement, and that he was coerced into accepting it. [R. 59-1 at 6]. However, these claims are clearly refuted by the record. [R. 52]. For this reason, Herman's argument fails to show the deficient performance or prejudice that is necessary to succeed on an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687. Herman can neither show

that his attorney's conduct fell below reasonably professional assistance, nor that he suffered any prejudice. *Id*. 687-95.

2. Speedy-Trial violation under 18 U.S.C. § 3161 and the Sixth Amendment.

a. Speedy Trial Act

Herman next claims that his right to a Speedy Trial under 18 U.S.C. § 3161 were violated because his case did not go to trial within the seventy (70) day time frame required by law. He contends that his counsel was ineffective for failing to seek dismissal of the charges against him, and that he is now entitled to relief in this action. However, because Herman cannot satisfy the requirements of *Strickland* to demonstrate ineffective assistance of counsel, this claim allows him no relief.

The court will begin its discussion of the Speedy Trial Act and its application to Herman's case by making specific reference to several key requirements that must be followed in conducting a proper calculation under the Act:

First, in this matter Herman was required to be tried within seventy days from the filing of the indictment or from the date of his first appearance before an officer of the court where the charges were pending, whichever last occurred. 18 U.S.C. 3161(c)(1). In this case, it means that the seventy (70) day trial clock did not begin to run until the date of his initial appearance and arraignment on the charges in the indictment on July 27, 2015. [R. 12].

Second, several motions were filed during the life of the case that resulted in several days being excluded from the seventy (70) day period. The basis for these excludable days comes from the language of the statute; one must keep in mind that any "delay resulting from any pretrial motion, *from the filing of the motion through the conclusion of the hearing on, or other prompt disposition*

of, such motion" is excluded from the seventy (70) day period under the Speedy Trial Clock. 18 U.S.C. 3161(h)(1)(D)(emphasis added).

Third, any delay due to his transportation to and from a facility for a mental competency evaluation, and the evaluation itself, are not counted in the seventy (70) day period. 18 U.S.C. 3161(h)(1)(A) & (F).

Herman's indictment was filed on July 23, 2015, and his first appearance on the charges in the indictment occurred on July 27, 2015. Therefore, the triggering date for speedy trial purposes was July 27, 2015. So, when Herman appeared for arraignment on July 27, 2015 his time for trial began. However, several delays did arise and extended the time for his trial to occur as described below:

1. Clock starts on July 27, 2015 upon Herman's first appearance on indictment.
2. Forty-eight (48) days run (July 28, 2015 – September 13, 2015)
3. Clock stops on September 14, 2015 when defense moves for continuance of trial.
4. Clock starts on September 18, 2015 when Court grants continuance.
5. Nine (9) days run (September 19, 2015 – September 27, 2015)
6. Clock Stops on September 28, 2015 through December 7, 2015 by virtue of being declared excludable [R. 16].
7. November 17, 2015 Motion for Competency evaluation is filed.
8. April 7, 2016, Competency issue was resolved and the case is scheduled for trial on May 16, 2016. The time between the filing of the motion for competency through and including the date of the hearing at which the issue was resolved (April 7, 2016) is declared excludable. [R. 30].
9. Clock starts on April 8, 2016.

10. Seventy (70) day clock runs on April 20, 2016.

11. Defendant moves for re-arraignment, having reached a plea agreement with the United States, on May 4, 2016, thirteen (13) days after running of Speedy Trial Clock. [R. 32].

Having now recognized a violation of the Speedy Trial Clock, the court proceeds with an analysis of whether counsel's failure to move for dismissal of the charges against Herman constituted ineffective assistance of counsel entitling Herman to relief in this action. Upon consideration of the law governing the issue, as more fully set forth below, the answer is "no".

A federal prisoner may successfully challenge his sentence under 28 U.S.C. § 2255 by showing that his sentence was imposed in violation of the Constitution or laws of the United States. An ineffective assistance of counsel claim may be used to prove such a constitutional violation, even where the underlying claim cannot otherwise be reviewed for the first time on a § 2255 motion. *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001). To be successful on an ineffective assistance counsel claim requires a showing of deficient performance and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness, while prejudice requires that there is a reasonable probability that but for counsel's unprofessional errors the results of the proceeding would have been different. *Id.* at 694.

The analysis of deficient performance rests on the petitioner showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. However, judicial scrutiny of counsel's performance must be highly deferential, and should be guided by a measure of reasonableness under prevailing professional norms. *Id*. at 688-89. Counsel need not pursue every possible claim or defense in order to avoid a

finding of deficient performance. *Sylvester v. United States*, 868 F.3d 503, 510 (6th Cir. 2017). Only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome. *Id*. (citing *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002)).

"The Speedy Trial Act was enacted to 'give effect to a Federal defendant's right to a speedy trial under the Sixth Amendment.'" *Sylvester v. United States*, 868 F.3d at 508 (citing *United States v. Rojas-Contreras*, 474 U.S. 231, 238 (1985)). "The Act requires that the relevant charges 'be dismissed or otherwise dropped' in response to any violation of the Act's provisions." *Sylvester*, 868 F.3d at 508 (citing 18 U.S.C. § 3162(a)(2)). Herman claims that Roberts should have challenged his case on this ground and that more than 154 non-excludable days passed between the time of his arrest when officers executed a search warrant at his residence until he he was brought to trial. [R. 59-1 at 6-7]. Herman is correct in stating that the Speedy Trial Act requires that a criminal defendant's trial commence within 70 days after he is charged or makes an initial appearance, whichever is later. 18 U.S.C. § 3161(c)(1); *Bloate v. United States*, 559 U.S. 196, 198-199 (2010); *United States v. Williams*, 753 F.3d 626, 634-35 (6th Cir. 2014). However, Herman miscalculates the time for trial under the Speedy Trial Act. Although a technical violation of the Speedy Trial Clock may have occurred, for Herman to be successful on his claim of ineffective assistance of counsel in this case requires that he show that Roberts' failure move to dismiss the indictment was both deficient performance and prejudicial. However, even if the Court assumes that Roberts was deficient in his representation, Herman suffered no prejudice as a result and he obtains no relief on this argument.

The facts of this case are like those addressed by the Sixth Circuit in *Sylvester v. United States*, 868 F.3d 503 (6th Cir. 2017). In *Sylvester*, the defendant, was convicted of various drug and firearms offenses. After his conviction and sentence were affirmed on appeal, Sylvester filed a motion to

vacate under 18 U.S.C. 2255, arguing that his counsel at trial and on appeal were ineffective for failing to move for dismissal of the charges against him based on a violation of his right to a speedy trial under the Speedy Trial Act. *Id*. at 503. In addressing the motion, the appellate court recognized that Sylvester's speedy trial clock exceeded seventy days, and stated that "[h]ad the trial court been made aware of these violations, it would have been compelled by the Act to dismiss the charges …" *Id*. at 509 (citing 18 U.S.C. §§ 3161(c)(1), 3162(a)(2); *see also Zedner v. United States*, 547 U.S. 489, 507 (2006)). Where, as here, Sylvester's case was before the Court on a motion for relief under 28 U.S.C. 2255, the Court proceeded to conduct an analysis of Sylvester's claim of ineffective assistance of counsel under the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005). In other words, in a motion for habeas relief, Sylvester was required to show that counsel's representation fell below an objective standard of reasonableness," and that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 510. The Sixth Circuit then held that because the Speedy Trial Act was violated and the violation would have led to dismissal of the charges, his counsel rendered deficient performance by not bringing those violations to the attention of the trial court. However, the Court proceeded to deny Sylvester any relief finding that Sylvester was not prejudiced by his counsels' inaction. *Id*. at 511-512.

Considering this authority, the Court will assume without finding that Roberts was deficient in not moving for dismissal based on a violation of the Speedy Trial Act after the deadline had run. Even with this assumption, as illustrated below, Herman's claim of ineffective assistance of counsel in this action fails as he can demonstrate no resulting prejudice.

In order to prove that Herman suffered prejudice by his counsel's deficient performance, he must show by "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "Where the defendant 'has not demonstrated that, but for his [counsel's] errors, the district court or [the court of appeals] on direct appeal would have ordered dismissal of the prosecution ***with prejudice*** based on a Speedy Trial Act violation,' he has not shown that counsel's deficient performance 'changed the result of the proceeding.'" *Sylvester*, 868 F.3d at 511 (citing *McAuliffe v. United States*, 514 Fed. Appx. 542, 546 (6th Cir. 2013)(emphasis added)). Therefore, for Herman to establish prejudice and thus, ineffective assistance of counsel, he must show a reasonable probability that, but for counsel's errors, the case against him would have been dismissed with prejudice.

In the event of a Speedy Trial Act violation, the district court retains discretion to determine whether to dismiss the case with or without prejudice based on three statutory factors. 18 U.S.C. § 3162(a)(2); *United State v. Taylor*, 487 U.S. 326, 336-37 (1988). The Act provides that, "[i]n determining whether to dismiss [a] case with or without prejudice, the court shall consider, among others, each of the following factors: [i] the seriousness of the offense; [ii] the facts and circumstances of the case which led to the dismissal; and [iii] the impact of a re-prosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(2); *Miller*, 799 F.3d at 1004; *Sylvester*, 868 F.3d at 512.

As for the first factor, the crimes Herman faced are very serious offenses, as evidenced by Herman's 300-month sentence, favoring dismissal without prejudice. [R. 44]; *See United States v. Robinson*, 389 F.3d 582, 588 (6th Cir. 2004) ("Given the length of the sentence, the offenses charged

against Robinson were serious and favored dismissal without prejudice."); *United States v. Koerber*, 813 F.3d 1262, 1276 & n. 19 (10th Cir. 2016) (seriousness of offense may be assessed "by considering the length of sentence Congress has adopted"). Herman was indicted on one count of production of child pornography, in violation of 18 U.S.C. 2251(a); one count of distribution of child pornography in violation of 18 U.S.C. 2252(a)(2); and one count of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). [R. 9]. This charged conduct involved his own six-year-old daughter; and the fact that his crimes brought possible penalties as serious as a sentence of not less than 15-years nor more than 30 years of imprisonment, show the crimes to be very serious. Thus, analysis of the first factor weighs heavily in favor of a finding that any dismissal of the charges against Herman would have been without prejudice.

As for the second factor, the Court considers the culpability of the conduct that led to the delay. *Koerber*, 813 F.3d at 1277. In this case, there is no evidence of intentional dilatory conduct, bad faith, or a pattern of prosecutorial neglect resulting in a violation of Herman's right to a speedy trial. In fact, the record reveals no evidence of delay occasioned by the government. As the case proceeded, the speedy trial clock was stopped only in response to motions filed on Herman's behalf/ Thus, Herman "expressly participated in the delay" when he requested a continuance of the trial, [R. 15], and when he requested a competency evaluation, [R. 17]. *See*,. *White*, 985 F.2d at 275. The final delay occurred when attorney Roberts made his first appearance as counsel for Herman on April 7, 2016, the date of his competency hearing, when only thirteen (13) days remained on the clock. Simply, that means that Roberts' choice was to insist on going to trial prior to the deadline's expiration which would require him to prepare the entire case for trial in less than two weeks or accept a later trial date. A defendant has the role of spotting a speedy trial violation, and the violation should be brought to

the court's attention prior to trial or entry of a guilty plea to prevent undue defense gamesmanship. *Zedner v. United States*, 547 U.S. 489, 502 (2006). Clearly, forcing Roberts to fashion a defense and proceed to trial in a case new to him, having only just met his client and addressed the competency issue would raise the issue of whether, in doing so, he would be forced into circumstances resulting in ineffective assistance of counsel for not seeking a delay or continuance. In addition, counsel should not be expected to lie in wait those thirteen days for the deadline to pass and then spring a motion of dismissal on the Court on April 21, 2016. *United States v. Miller*, No. 05-143, 2018 WL 6308786, *9 (D.D.C. Dec. 3, 2018) ("trial counsel should understand the court's frustration at an attorney agreeing to a date in the future, silently lying in wait for a STA violation, and then filing a motion to dismiss on the STA violation"). Therefore, the circumstances which lead to the delay were not intentional nor prejudicial to Herman, and this factor weighs heavily in favor of a finding that any dismissal of the charges would have been without prejudice.

Finally, the third factor to be considered is the impact of a re-prosecution on the administration of justice. Regarding the third and final factor, "[t]he main considerations that courts have taken into account ... are whether the defendant suffered actual prejudice as a result of the delay, and whether the government engaged in prosecutorial misconduct that must be deterred to ensure compliance with the Act." *Id*. at 512 (citing *Howard*, 218 F.3d at 562). Herman presents no argument or evidence of any prejudice, or other way in which he would suffer in his defense if he were re-indicted and again faced the possibility of trial on the same offenses. In addition, he presents no evidence of prosecutorial misconduct that must be deterred to ensure compliance with the Speedy Trial Act. *Id*. at 513. Because "'there is no evidence here of prosecutorial misconduct that must be deterred to ensure compliance with the Act,' the third factor supports dismissal without prejudice." *Sylvester*, 868 F.3d at 513 (citing

United States v. Pierce, 17 F.3d 146, 149 (6th Cir. 1994)). The absence of prejudice to Herman resulting from the delay "strongly weighs in favor of dismissal without prejudice." *Id*. (*quoting United States v. Ferguson*, 565 F.Supp.2d 32, 48 (D.D.C. 2008)); (citing *Taylor*, 487 U.S. at 341).

For these reasons, Herman is entitled to no relief on this claim as he "has not shown that the charges against him in the underlying prosecution would have been dismissed with prejudice," therefore he "has not shown that the results of the proceeding would have been different but for the deficient performance." *Sylvester*, 868 F.3d at 513 (citing *McAuliffe*, 514 Fed. Appx. at 546).

b. Right to a Speedy Trial

In addition to his Speedy Trial Act claim, Herman also alleges a violation of his Sixth Amendment right to a speedy trial. [R. 59 at 6]. The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend VI. "'Although the passage of the [Speedy Trial] Act was in part an attempt by Congress to quantify the Sixth Amendment right to a speedy trial, the legislation does not purport to be coextensive with that amendment.'" *United States v. Howard*, 218 F.3d 556, 563-64 (6th Cir. 2000) (citing *United States v. Gonzalez*, 671 F.2d 441, 443 (11th Cir. 1982); see also 18 U.S.C. § 3173 ("No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution."); *United States v. Rice*, 746 F.3d 1074, 1081 (D.C. Cir. 2014) ("The absence of a Speedy Trial Act violation does not ipso facto defeat a Sixth Amendment speedy trial claim."). The two rights are related but distinct, so that a violation of one may be found without a violation of the other. *United States v. White*, 443 F.3d 582, 588 (7th Cir. 2006) (citing *United States v. Koller*, 956 F.2d 1408, 1413 (7th Cir. 1992)). While "the government's compliance with the Speedy Trial Act does not bar future Sixth Amendment

speedy trial provision claims, [the Sixth Circuit has] previously held that 'it will be an unusual case in which the time limits of the Speedy Trial Act have been met but the Sixth Amendment right to a speedy trial has been violated.'" *United States v. O'Dell,* 247 F.3d 655, 666-67 (6th Cir. 2001) (citing *United States v. DeJesus*, 887 F.2d 114, 116 (6th Cir. 1989)); *see also United States v. Bieganowski*, 313 F.3d 264, 284 (5th Cir. 2002); *United States v. Nance*, 666 F.2d 353, 360 (9th Cir. 1982); *United States v. Schlei*, 122 F.3d 944, 986 (11th Cir. 1997). While "defeat on a Speedy Trial Act claim does not bar a similar Sixth Amendment claim, it will be persuasive in considering the merits of the constitutional claim." *O'Dell*, 247 F.3d at 673 (citing *DeJesus*, 887 F.2d at 116 n. 1 (declining to consider a Sixth Amendment speedy trial claim after resolving a Speedy Trial Act claim against defendant)). Thus, determining compliance with the Act is a question of statutory interpretation, while the Sixth Amendment inquiry is to be guided by the Supreme Court's decision in *Barker v. Wingo*, 407 U.S. 514 (1972). *United States v. Gonzalez*, 671 F.2d 441, 442-43 (11th Cir. 1982).

"In *Barker v. Wingo*, the Supreme Court identified four factors that courts should consider when determining whether a defendant's Sixth Amendment right has been violated: (1) the "[l]ength of the delay"; (2) "the reason for the delay"; (3) "the defendant's assertion of his right"; and (4) "prejudice to the defendant." 407 U.S. 514, 530 (1972). The first factor is a threshold requirement. *United States v. Williams*, 753 F.3d 626, 632 (6th Cir. 2014) (citing *Wingo*, 407 U.S. at 530). "[I]f the length of the delay is not uncommonly long, then the judicial examination ends." *United States v. Bass*, 460 F.3d 830, 836 (6th Cir. 2006). Conversely, a delay of one year or more is considered "presumptively prejudicial" and, as such, satisfies the first *Barker* factor, triggering examination of the remaining three. *Id*. However, "to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively

prejudicial' delay…." *United State v. Williams*, 683 Fed. Appx. 376, 383 (6th Cir. 2017) (citing *Doggett v. United States*, 505 U.S. 647, 651-52 (1992)). "'In calculating the length of the delay, only those periods of delay attributable to the government or the court are relevant to the defendant's constitutional claim.'" *Williams*, 683 Fed. Appx. at 383 (citing *United States v. Howard*, 218 F.3d 556, 564 (6th Cir. 2000)); *see also United States v. White*, 985 F.2d 271, 275 (6th Cir. 1993) (excluding from the time counted towards a Sixth Amendment violation the time during which the defendant "expressly participated in the delay."). "'The length of delay is measured from the earlier of the date of indictment or arrest to the defendant's trial.'" *Id*. (citing *United States v. Bass*, 460 F.3d 830, 836 (6th Cir. 2006).

As all the delays in this case were caused by Herman, he cannot now claim a violation of his constitutional rights based on his own actions. Unlike the Speedy Trial Act, this calculation begins, here, at the day of Herman's arrest which was June 23, 2015. *Williams*, 683 Fed. Appx. at 383. The entry of his plea stops the clock, and this occurred on May 4, 2016. This amounts to three hundred and sixteen (316) days. Herman "expressly participated in the delay" when he requested a continuance of the trial, [R. 15], and when he requested a competency evaluation, [R. 17], which results in an exclusion of one hundred and ninety-two (192) days. *White*, 985 F.2d at 275. Thus, one hundred and twenty-four (124) days remain attributable to the trial process. If the optimal trial process and normal procedure would take seventy (70) days, then fifty-four (54) days is the maximum time he can claim as a delay. These same fifty-four (54) days include the time between arrest and indictment and the time for his second attorney, Roberts, to prepare for trial and/or negotiate the plea agreement. Therefore, as the time of any delay was less than one-and-one-half-month this is clearly not a violation of 6th Amendment right to a speedy trial. *See Howard*, 218 F.3d at 564 (a delay of

five months is not per se excessive under the Sixth Amendment); *White*, 985 F.2d at 275 (finding that a six-and-one-half-month delay was not excessive); *United States v. Holyfield*, 802 F.2d 846 (6th Cir. 1986) (holding that a five-month delay was constitutionally permissible). Therefore, because ". . . the length of the delay is not uncommonly long, then the judicial examination ends." *United States v. Bass*, 460 F.3d 830, 836 (6th Cir. 2006). Thus, his 6th Amendment right to a speedy trial claim fails and will not provide him with any **relief**.

3. Failure to Properly File Paperwork.

Like Gore, Herman also asserts that Roberts failed to properly file documents with the Court. His argument is focused on one filing by Roberts on May 4, 2016, when Roberts filed a motion for re-arraignment, but did not attach a proposed order, as required by Local Criminal Rule 12.1(f). [R. 32]. The clerk notation in the record informed Roberts that "within seven calendar day (he was to) prepare a pleading entitled 'Notice of Filing' (with a certificate of service), file the Notice using the event 'Notice of Filing,' attach the proposed order, and create a link to the related docket entry." *See* [Docket Sheet at 5/5/16]. On that same day, Roberts addressed the issue and filed the proposed order. [R. 34]. The Court granted the motion for re-arraignment on May 5th, 2016. [R. 33]. Even if the Court assumed that this minor error is evidence of deficient performance, Herman fails to demonstrate how he suffered prejudice. To establish prejudice in the ineffective assistance of counsel context, Herman must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of his proceedings would have been different. *Strickland*, 466 U.S. at 694-95. The record before the court reflects no conceivable prejudice as he was granted the relief he sought, and this claim fails to provide Herman any relief.

4. Failure to notify the judge of the lengthy pretrial incarceration during sentencing.

Herman next argues that his counsel, Roberts, should have mentioned his "lengthy incarceration" to the judge during his sentencing and that this should have been a factor considered by the judge in imposing his sentence. [R. 59-1 at 8]. It appears that Herman is asking the Court to consider his time served in the sentencing calculation, however the sentencing Court does not perform this calculation. *O'Bryan v. Terris*, No. 17-2025, 2018 WL 4191326, at * 1 (6th Cir. Mar. 1, 2018) (citing *United States v. Wilson*, 503 U.S. 329, 334-35 (1992)). Rather, it is the Bureau of Prisons who calculates and is authorized to grant a defendant credit for time served prior to sentencing under 18 U.S.C. § 3585; *Id.*

Moreover, the time served in custody prior to sentencing is not a factor for a court to consider in sentencing. Courts in imposing a sentence consider the factors found in 18 U.S.C. § 3553(a). *United States v. Vowell*, 516 F.3d 503, 512 (6th Cir. 2008). A sentence is substantively reasonable if it is proportionate to the seriousness of the circumstances of the offense and offender, and sufficient but not greater than necessary to comply with the purposes of 18 U.S.C. § 3553(a). *United States v. Graham*, 564 Fed. Appx. 196, 198 (6th Cir. 2014). A properly calculated within-guidelines sentence will be afforded a rebuttable presumption of reasonableness on appeal because it is one of the § 3553(a) factors and because the guidelines purport to take into consideration most, if not all, the other § 3553(a) factors. *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *Gall v. United States*, 552 U.S. 38, 49 (2007).

Herman has failed to show that his pretrial incarceration should have been considered by the judge in determining his sentence. Moreover, Herman does not claim that the Court's guideline range was improperly calculated. The Court in imposing sentence adequately explained the chosen sentence and granted a downward variance from the guideline calculation. [R. 43 at 11-16]; *Gall,* 552 U.S. at

50. Therefore, Herman has failed to show that he was prejudiced and that the results of his proceedings would have been different, because pretrial incarceration is not a factor a Court considers in imposing sentence and any credit earned against his sentence by his pretrial incarceration is to be calculated by the Bureau of Prisons and not the Court in calculating sentence. *Strickland*, 466 U.S. at 694-95.

5. Failure to argue sentencing reduction under U.S.S.G. § 5K2.0.

Next, Herman claims that Roberts should have argued for a sentencing departure pursuant to U.S.S.G. § 5K2.0, based on the psychological evaluation report stating that he is not a pedophile and that he suffers from an unspecified trauma disorder. [R. 59-1 at 8]. He argues that had this been done, it would have mitigated in favor of a reduced sentence. However, this argument will not provide Herman with any relief in this action.

First, Herman argues that at sentencing counsel was ineffective for failing to assert that Herman was not a pedophile. However, a review of the competency report leads to no such conclusion, and his argument is therefore not factually supported. The competency evaluation report in this case indicates, in the section entitled "Clinical Formulation and Diagnostic Impression:" "Rule out Pedophilia". Although Herman is not diagnosed as a pedophile in the report the evaluator commented that: "As pending legal circumstances are likely to inhibit self-disclosure regarding deviant sexual interest, further assessment, post adjudication**,** of Mr. Herman's sexual history, sexual interest, and past behaviors within the context of a sex offender treatment program is recommended to determine the level and degree of Mr. Herman's problematic sexual behavior and interests and whether a diagnosis of a Pedophilic Disorder is warranted." [R. 49, p. 28(emphasis in original)]. Thus, contrary to Herman's belief there was no diagnosis ruling out the possibility that he suffered from a

Pedophilic Disorder. Rather, the evaluator merely commented on the need to conduct a full assessment, post adjudication, by and through his participation in a sex offender treatment program. Therefore, Herman's argument that counsel was deficient at sentencing for failing to argue that Herman was not a pedophile is not factually supported and provides Herman with no relief.

Next, Herman asserts that counsel should have argued that he suffers from an unspecified trauma disorder. Again, this argument allows Herman no relief. At his sentencing both sides addressed his military service and that he was not the same when he returned home. [R. 43 at 7, line 14-21; R. 43 at 9, line 3-5]. Therefore, the argument which Herman would have liked the Court to consider was in fact brought before the Court and considered by the Court. In addition, the record does not reflect the existence of a condition warranting departure under the guidelines.

Section 5K2.0 allows courts to sentence outside the guideline range if the court finds, "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0. Herman plead guilty to 18 U.S.C. § 2251(a), persuading, inducing, enticing, and coercing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct. [R. 36 at 1]. According to that statute, "any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years…." 18 U.S.C. § 2251(e**).** In this case, the applicable guideline range for Mr. Herman was 360 months. Herman was sentenced to three hundred (300) months or twenty-five years. [R. 43 at 12, line 24]. Thus, the Court did deviate from the maximum which he could have received and departed downward to 300 months. As Roberts based his arguments for a minimum sentence at sentencing on valid

reasons including Herman's military service, the repercussions from that service, and Robert's request for (15) fifteen years, the lowest possible statutory incarceration time, Herman has failed to show that Robert's actions were deficient. *Strickland*, 466 U.S. at 687-88. In short, his argument is again factually unsupported and in fact contradicted by the record.

"Counsel is not required to be prescient or to raise futile arguments on behalf of his client. Counsel's strategy of pressing stronger arguments at sentencing was reasonable at the time and cannot be considered to be constitutionally deficient performance." *Garcia v. United States*, No. 99-1134, 2000 WL 145358, at *2 (6th Cir. Feb. 2, 2000); *Krist v. Foltz*, 804 F.2d 944, 946 (6th Cir. 1986).

6. Failure to argue sentencing manipulation by the Government and undercover officer(s).

Herman next argues that Roberts failed to object to government sponsored entrapment and sentencing manipulation which allegedly resulted in his prosecution and a longer sentence being imposed.[R.59-1 at 8-9].

Specifically, Herman states that "the government's undercover agent suggested and induce(d) [him] to take pictures on [June 22, 2015]." [R. 59-1 at 8]. That he "had never taken pictures prior to [June 22, 2015]." [*Id.*]. Also, that "(b)ut for the government agent's outrageous conduct, [he] would not have taken pictures nor thought of the type of pictures to take. The government encouraged a sex act (a two (2) level increase). The government also categorized that as a sadist, masochistic, violent act (a four (4) level increase). This resulted in a sentence enhancement against [him]…[that he] should not have received…due to the government's outrageous leading conduct." [*Id.* at 9].

Herman puts forth these arguments in the context of an ineffective assistance of counsel claims. Essentially, he claims that his attorney should have argued entrapment and/or manipulation and objected to the enhancements before he plead guilty. Turning first to the issue of alleged

entrapment, and counsel's alleged ineffective assistance for failing to raise the issue, in order to show ineffective assistance of counsel Herman will have to show that an entrapment defense would have had merit during his prosecution. *Halvorsen v. White*, 746 Fed. Appx. 489, 500 (6th Cir. 2018) (citing *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001)).

"An entrapment defense has two elements: (1) government inducement of the crime, and (2) a lack of predisposition on the part of the defendant to engage in the criminal conduct." *United State v. Demmler*, 655 F.3d 451, 456 (6th Cir. 2011). "At the most basic level, defendants pleading entrapment, or one of its derivative theories, argue that they should escape, or receive a lesser, punishment because the government's conduct induced them to commit the crime." *Hammadi,* 737 F.3d at 1048. "Predisposition, 'the principal element in the defense of entrapment,' focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime. *Mathews v. United States*, 485 U.S. 58, 63 (1988) (citing *United States v. Russell*, 411 U.S. 423, 433 (1973); *Sherman v. United States*, 356 U.S. 369, 372 (1958)). Therefore, Herman must show that the Government induced him to commit the crime and that he was not predisposed to engage in this type of criminal conduct. Nonetheless, Herman has failed to provide proof of either.

First, as discussed above, Herman entered into his plea agreement knowingly, voluntarily, intelligently, and without threat or coercion. [R. 52 at 15]. Paragraph 3 of the plea agreement contains a statement of facts or a description of events that the government says that it could prove, and under oath Herman admitted that he was willing to plead guilty because he had committed the conduct described therein. [R. 52 at 10]. Paragraph 3(c) of the plea agreement specifically states that "(t)he Defendant persuaded, induced, enticed and coerced the minor victim to take the pictures when she

was naked." [R. 36 at 2]. Paragraph 3(d) of the plea agreement specifically states that "(t)he Defendant knew that the visual depictions he created would be transmitted using a means or facility of interstate commerce, including by computer." [*Id.*]. Herman's under oath affirmations of this conduct "'constitute a formidable barrier in any subsequent collateral proceedings' because '[s]olemn declarations in open court carry a strong presumption of verity.'" *Burt*, 2018 WL 2015779, at *3 (citing *Blackledge*, 431 U.S. at 73-74). Also, the two-level and four-level enhancements were included in the plea agreement, specifically in paragraph 4(e) and (f). [R. 36 at 3]. Herman was also asked, at his rearraignment, whether he reviewed the plea agreement, whether he understood it, and also whether he discussed the plea agreement with his attorney. [R. 52 at 10]. Herman answered in the affirmative as to all three questions. Thus, Herman admitted to his wrongful actions, the accuracy of the depiction of his conduct in the plea agreement, and he was aware of the sentencing enhancements to be applied against him.

Second, the record reflects that Herman's own statements to the Under-Cover Officer (UC) show that he was not induced, by the Government's conduct, into committing a crime he otherwise would not have committed. *Hammadi,* 737 F.3d at 1048. Herman also fails to state what Government conduct was so reprehensible that it would constitute grounds for an entrapment defense. It important to note that "only when the Government's deception actually implants the criminal design in the mind of the defendant [will] the defense of entrapment come into play." *United States v. Russell*, 411 U.S. 423, 436 (1973). The Government's first action was to place the advertisement on the website known to be frequented by individuals having a sexual interest in children. [R. 49 at 3]. While obviously a fake advertisement, it was posted so that anyone who wanted could respond. It was not targeted at Herman. He made the decision to seek out whomever had posted the advertisement. This is not an

inducement, this is offering an opportunity for the commission of an offense and it will not defeat a prosecution. *Russell*, 411 U.S. at 436. Upon seeking out whomever was on the other side of the advertisement, Herman began the conversation with the UC. The Transcript reads as follows:

Def. Herman:	Hi
UC:	Hi asl where u find me?
Def. Herman:	Sex forum
Def. Herman:	Pervdads/family
UC:	You a dad?
Def. Herman:	27m.
Def. Herman:	yes
UC:	Same here 9 yo girl and active you?
UC:	Location? DC Va here
Def. Herman:	6 yr old beginning
Def. Herman:	SC
UC:	Hot how far have you gone
Def. Herman:	Pics rubbing and helping with showers
Def. Herman:	*U got pics to trade?*
UC:	Mmmm nice, yes is yours there now?
Def. Herman:	Yes

[R. 1-1 at 3-4] (emphasis added).

As can be seen from the transcript of the conversation, it is Herman not the Government that started and directed the conversation. The Government asks Herman questions to determine Herman's identity, who his victim was, what Herman had done to his victim, and to establish that the victim was there with him in real time. [*Id.*]. Most importantly to Herman's claim, that he would not have taken pictures nor thought of the type of pictures to take, is the fact that he states he took pictures

in the past. [R. 1-1 at 4] ("Def: all within the last week," to purportedly show that the picture he sent were all taken within the last week). Therefore, Herman could not have been induced by the Government, because he had already taken some of the pictures prior to the conversation with the UC starting, and Herman was the one who wanted to trade those pictures.

Finally, Herman was predisposed to committing this crime. Not only did Herman start the conversation, but he was also the first to ask about pictures and the possibility of trading those pictures, as can be seen above in the transcript. After Herman opened the door to discussing trading pictures, the UC asked if Herman had "ever taken any special ones (pictures) in the past" and if he could see. [R. 1-1 at 4]. Herman responded by saying "(n)udes? Yeah u?," which shows that Herman had already taken explicit pictures of his daughter in the past. His request to trade pictures evidences a strong likelihood that he could have already traded these pictures prior to this conversation. Herman was not an otherwise law-abiding citizen, he had taken pictures of his daughter in the past and clearly intended to trade those pictures for other illegal pictures of children with the UC. *See United States v. Hibbler*, 159 F.3d 233, 237-38 (6th Cir. 1998). Thus, Herman was already predisposed to commit this crime and the Government merely provided him the opportunity. *Demmler*, 655 F.3d at 457; *United States v. Al-Cholan*, 610 F.3d 945, 951 (6th Cir. 2010) (predisposition to travel across state lines to molest children can be shown even without specific evidence of inclination to commit every element of the precise crime of conviction, because it is not necessary that the past conduct be precisely the same as that for which the defendant is being prosecuted).

Therefore, Herman's counsel was not ineffective in failing to raise the issue of entrapment. Given the analysis above, an entrapment defense would have been unsuccessful either prior to Herman entering the plea agreement or on appeal, and this claim provides him no relief.

Turning next to his claim of sentencing manipulation, it should be noted that claims of sentencing entrapment and sentencing manipulation have never been recognized by the Sixth Circuit as valid defenses. *Hammadi*, 737 F.3d at 1048 (6th Cir. 2013) (citing *United States v. Guest*, 564 F.3d 777, 781 (6th Cir. 2009)). Thus, his attorney was not ineffective for raising those defenses which are not recognized. Yet, Herman is correct that a few other Circuits do recognize some or a part of these defenses. *See United States v. Beltran*, 571 F.3d 1013, 1021 n. 1 (10th Cir. 2009). Even if the Sixth Circuit recognized sentencing entrapment or sentencing manipulation as a defense, both would be inapplicable here. "Under either theory, the defendant bears the burden of proof as to his lack of predisposition and to the outrageousness of government conduct." *Hammadi*, 737 F.3d at 1048 (citing *United States v. Jernigan*, 59 Fed. Appx. 647, 650 (6th Cir. 2003)). As explained above, Herman has not shown any outrageous government conduct. His only basis for entrapment or manipulation is the government's interaction with him regarding the production and transmitting of the explicit pictures of his daughter. The Government may have deceived him into thinking he was conversing with an equally guilty criminal, but the Government did not induce him to produce and transmit those photos. The mere fact of deceit will not "defeat a prosecution for there are circumstances when the use of deceit is the only practicable law enforcement technique available." *Russell*, 411 U.S. 423, 435-36 (1973) (citing *Lewis v. United States*, 385 U.S. 206, 208-09 (1966)). Herman was also already clearly predisposed to produce and transmit the pictures, because he already had them in his possession and he was the one who asked to trade. *See* [R. 1-1 at 3]; *See also Hammadi*, 737 F.3d at 1049 ("the ready commission of the criminal act amply demonstrates the defendant's predisposition."). Moreover, the advertisement was not created for Herman specifically, but it was Herman who sought it out. Herman

has failed to show how sentencing entrapment and/or manipulation would be relevant in this situation and he has failed to prove the substantive defense of entrapment.

Herman has failed to prove that Roberts was deficient in his performance or that he was prejudiced. "Where ineffective assistance at sentencing is asserted, prejudice is established if the movant demonstrates that his sentence was increased by the deficient performance of his attorney." *Spencer v. Booker*, 254 Fed. Appx. 520, 525 (6th Cir. 2007) (citing *Glover v. United States*, 531 U.S. 198, 200 (2001)). "If 'one is left with pure speculation on whether the outcome of…the penalty phase could have been any different,' there has been an insufficient showing of prejudice." *Booker*, 254 Fed. Appx. at 525 (*quoting Baze v. Parker*, 371 F.3d 310, 322 (6th Cir. 2004)). Here, not only does the Sixth Circuit not recognize sentencing enhancement and manipulation as valid defenses or reasons for departure, but Herman has failed to provide the proof that either applies in this case. Additionally, Herman's sentence was properly calculated under the Federal Sentencing Guidelines and the § 2G2.1(b)(2)(A) two-level increase and § 2G2.1(b)(4) four-level increase were properly included. Thus, any argument to the contrary would have been futile and pointless. As the outcome of the penalty phase could not have been any different, Herman has failed to show that he was prejudiced, and this claim fails to provide him any relief.

7. Improper use of Anders Brief.

Herman next argues that Roberts was ineffective for improperly filing an *Anders* brief on appeal. [R. 59 at 6; R. 59-1 at 6]. The United States Supreme Court in *Anders v. California*, 386 U.S. 738 (1967), held that a criminal appellant may not be denied representation on appeal based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal. *Penson v. Ohio*, 488 U.S. 75, 80 (1988). However, the Court recognized that in some circumstances

counsel may withdraw without denying the indigent appellant fair representation provided that certain safeguards are observed. These safeguards, now colloquially known as the *Anders* procedures, require counsel to first conduct a conscientious examination of the case. If the attorney is then of the opinion that the case is wholly frivolous, counsel may so advise the court and request permission to withdraw. The request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. Once the appellate court receives this brief, it must then itself conduct a full examination of all the proceedings to decide whether the case is wholly frivolous. Only after this separate inquiry, and only after the appellate court finds no nonfrivolous issue for appeal, may the court proceed to consider the appeal on the merits without the assistance of counsel. *Penson*, 488 U.S. at 80 (citing *Anders*, 386 U.S. at 744).

To begin, Herman waived any substantive claim under the Speedy Trial Act when he entered a guilty plea in the underlying action. 18 U.S.C. § 3162. Thus, a Speedy Trial Act violation was not properly preserved and could not have been raised except as a claim for ineffective assistance of counsel. So, the convoluted inquiry is: was counsel on appeal ineffective for failing to raise a claim that he (counsel) was ineffective in representing Herman during the underlying prosecution? For the reasons that follow, the answer, again, is "no". The proper standard for evaluating appellate counsel's ineffectiveness in neglecting to file a merits brief rather filing an *Anders* brief is that enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Herman "must first show that his counsel was objectively unreasonable in failing to find arguable issues to appeal–that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Robbins*, 528 U.S. at 285. If this can be shown, then he still has the burden of demonstrating prejudice by showing a reasonable probability that but for his counsel's

unreasonable failure to file a merits brief he would have prevailed on his appeal. *Id*. (citing *Strickland*, 466 U.S. at 694). In this case none of Herman's claims would have allowed a meritorious argument on appeal. However, having found above that Herman's right to a timely trial under the Speedy Trial Act was violated, it is necessary to illustrate that his counsel was not ineffective for failing to raise a Speedy Trial Act violation before the Sixth Circuit Court of Appeals.

"As a general rule, a defendant may not raise ineffective-assistance-of-counsel claims for the first time on direct appeal, since there has not been an opportunity to develop and include in the record evidence bearing on the merits of the allegations." *United States v. Warman*, 578 F.3d 320, 348 (6th Cir. 2009); *United States v. Garba*, 307 Fed. Appx. 698, 702 (3rd Cir. 2009). Thus, "ineffective assistance of counsel claims are best brought on collateral review, so that the parties can develop an adequate record" of the issues. *Warman*, 578 F.3d at 348; *See Garba*, 307 Fed. Appx. 698 ("[T]he practice of this court [is] to defer the issue of ineffectiveness of trial counsel to a collateral attack."); "When, however, the record is adequate to assess the merits of defendant's allegations," then some courts will consider claims of ineffective assistance of counsel on direct appeal. *United States v. Wunder*, 919 F.2d 34, 37 (6th Cir. 1990). For the record to be adequate it must show why counsel undertook the disputed action. *See United States v. August*, 984 F.2d 705, 711 (6th Cir. 1992); *See also United States v. Crowe,* 291 F.3d 884, 886 (6th Cir. 2002) (citing *United States v. Earle*, No. 97-3171, 1998 WL 465350, at *3 (6th Cir. July 28, 1998) (unpublished table decision) ("The record is not adequate for review on direct appeal if facts about the impugned attorney's decision-making process and strategy must be determined to resolve the claims of inadequate representation.")).

Here the Sixth Circuit "granted counsel's motion to withdraw because no arguable grounds for appeal exist[ed]." [R. 55 at 3]. However, the Sixth Circuit did state that "(t)he claims that Herman

raises in his response appear to be primarily issues of the ineffective assistance of counsel. To the extent that Herman wishes to raise such claims, they are more appropriately raised on collateral review because the record on direct appeal is often insufficient to assess the merits of the claim." [R. 55 at 6]. Furthermore, following the United State Supreme Court's decision in *Massaro*, an ineffective assistance of counsel claim does not have to be brought on direct appeal to preserve the claim for a collateral attack. 538 U.S. at 509. The Court stated that in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance. *Id*. at 504. "The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them." *Id*. at 505.

Because claims of ineffective assistance of counsel are not generally entertained on appeal, counsel was not deficient in failing to raise such a claim on direct appeal. Moreover, even assuming that the record was sufficiently developed to allow a claim of ineffective assistance of counsel to be analyzed on direct appeal, for the reasons discussed previously the claim was without merit as Herman suffered no prejudice from any violation of the Speedy Trial Act. Thus, his counsel was not ineffective on appeal for filing an *Anders* brief.

In conclusion, because all of Herman's ineffective assistance counsel claims fail to provide him any relief, and because the Sixth Circuit found there was no arguable issue to be raised on appeal, he has failed to show that his counsel was objectively unreasonable in failing to find arguable issues to appeal. *See Sharp v. Warden*, *Pickaway Correctional Inst*., No. 1:10-CV-831, 2011 WL 6960850, *18 (S.D. Ohio Dec. 12, 2011). Therefore, this claim fails to provide Herman any relief.

V. MOTION FOR HEARING

Pursuant to Rule 4, Rules Governing § 2255 Proceedings, a motion to vacate may be summarily denied if it plainly appears from the face of the motion and any annexed exhibits that the movant is not entitled to relief. *Smith v. United States*, 348 F.3d 545, 550 (6th Cir. 2003); *Baker v. United States*, 781 F.2d 85, 92 (6th Cir. 1986). In the alternative, "When a factual dispute arises in a § 2255 proceeding, an evidentiary hearing is required 'to determine the truth of the petitioner's claims.'" *Ray v. United States*, 721 F.3d 758, 761 (quoting *Valentine v. United States,* 488 F.3d 325, 333 (6th Cir. 2007)). The Sixth Circuit has observed that a § 2255 petitioner's "burden 'for establishing an entitlement to an evidentiary hearing is relatively light.'" *Smith*, 348 F.3d at 551 (quoting *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999)). However, no hearing is required if the movant's allegations cannot be accepted as true because they are contradicted by the record, are inherently incredible, or are conclusions rather than statements of facts. *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999); *Peavy v. United States*, 31 F.3d 1341, 1345 (6th Cir. 1994).

In this case, the undersigned will recommend Herman's claims, found in his Motion to Vacate, be denied. Furthermore, there is no factual dispute necessitating an evidentiary hearing. Even though Herman's burden for establishing a right to an evidentiary hearing is light, it cannot be met because his allegation(s) clearly contradict the record and are conclusion rather than statements of fact. For these reasons, an evidentiary hearing is not necessary.

VI. CONCLUSION

For the reasons set forth above, it is **RECOMMENDED** that Herman's Motion to Vacate [R. 59] be **DENIED**.

The parties are directed to 28 U.S.C. § 636(b)(1) for a review of appeal rights governing this Report and Recommendation. Particularized objections to this Report and Recommendation must be filed within fourteen (14) days from the date of service thereof or further appeal is waived. *United States v. Campbell*, 261 F.3d 628, 632 (6th Cir. 2001); *Thomas v. Ann*, 728 F.2d 813, 815 (6th Cir. 1984). General objections or objections that require a judge's interpretation are insufficient to preserve the right to appeal. *Cowherd v. Million*, 380 F.3d 909, 912 (6th Cir. 2004); *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995). A party may file a response to another party's objections within fourteen (14) days after being served with a copy thereof. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b).

This the 29th day of March, 2019.

Signed By:
Edward B. Atkins EBA
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

UNITED STATES OF AMERICA, **Plaintiff,** **V.** **CODY LEE HERMAN,** **Defendant.**	**CRIMINAL ACTION NO. 5:15-65-KKC** **OPINION AND ORDER**

*** *** ***

Defendant Cody Herman has moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (DE 59.) Pursuant to local practice, the motion was referred to United States Magistrate Judge Edward B. Atkins for review under 28 U.S.C. § 636(b)(1)(B). This matter is now before the Court on the Magistrate's Report and Recommendation ("R&R") (DE 77) and Defendant's objections (DE 85). Having conducted a de novo review of the portions of the R&R to which Defendant objects, the Court will adopt the Magistrate's recommended disposition and **DENY** Defendant's motion for § 2255 relief. Moreover, the Court **REFUSES** to issue a certificate of appealability because the Defendant has not made a substantial showing of the denial of any constitutional right.

BACKGROUND

This case began when a Federal Bureau of Investigation Child Exploitation Task Force Under Cover Officer (UC) posted an online advertisement on a website known to be frequented by individuals having a sexual interest in children. Defendant Herman responded to the advertisement. His response indicated that he was in the beginning stages of abusing his daughter, who was six years old at the time of the offense. The UC and Defendant maintained a conversation on Kik, an instant messaging application for mobile

devices. The statements made and images shared by the Defendant during the conversation led the UC to believe that the Defendant's daughter was in immediate danger. On June 23, 2015, law enforcement executed a search warrant at Defendant's residence. Officers seized Defendant's cellphone and discovered images of child pornography that he had taken of his daughter inside his home. (*See* DE 77 at 1-3.)

Defendant was indicted on one count of production of child pornography, in violation of 18 U.S.C. § 2251(a); one count of distribution of child pornography, in violation of § 2252(a)(2); and one count of possession of child pornography, in violation of § 2252(a)(4)(B). (DE 9.)

Defendant pleaded guilty to production of child pornography and was sentenced to 300 months imprisonment, 30 years of supervised release, and a $100 special assessment. (DE 36 and 44.) All remaining counts were dismissed.

Defendant filed an appeal with the Sixth Circuit Court of Appeals. However, Defendant's attorney, H. Wayne Roberts, filed an *Anders* brief and moved to withdraw as counsel stating that no arguable grounds for appeal existed. The Sixth Circuit, after reviewing the *Anders* brief and conducting its own independent review, affirmed the judgment of this Court. (DE 55.)

Defendant filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. (DE 59.) His motion asserts ineffective assistance of counsel claims against his initial appointed attorney, Charles Gore, and his second appointed attorney, Roberts. Defendant's petition asserts that Gore was ineffective for (1) failing to have Defendant psychologically evaluated for five months; (2) failing to properly file paperwork; and (3) withdrawing without cause. Defendant's petition asserts that Roberts was ineffective for (1) being unavailable and failing to notify the Court of the prosecution's threats during plea negotiations; (2) failing to file a motion to dismiss for violations of the Speedy Trial Act and the Sixth Amendment; (3) failing

to properly file paperwork; (4) failing to mention the length of his pretrial incarceration to the judge during sentencing; (5) failing to seek a sentencing reduction under U.S.S.G. § 5K2.0; (6) failing to argue sentencing manipulation by the Government and undercover officers; and (7) improper use of an *Anders* Brief. (*See* DE 59.)

The Magistrate issued a R&R recommending that Defendant's § 2255 petition be denied on all grounds. (DE 77.) Defendant has filed objections to the Magistrate's R&R. (DE 85.) Defendant's objections only address the ineffective assistance of counsel claim against Roberts for failing to file a motion to dismiss for violations of the Speedy Trial Act and the Sixth Amendment. The Defendant does not object to the Magistrate's recommendations regarding any other claims.

ANALYSIS

I. Standard of Review.

This Court performs a de novo review of those portions of the Magistrate's R&R to which Defendant has objected. *See* 28 U.S.C. § 636(b). The Court, however, does not perform a de novo review of the R&R's unobjected-to findings as such is not required. *Thomas v. Arn*, 474 U.S. 140, 150 (1985).

The Court further recognizes its obligation to review Defendant's objections under a more lenient standard than the one applied to attorneys because he is proceeding pro se. *See Franklin v. Rose*, 765 F.2d 82, 84-85 (6th Cir. 1985). Under this more lenient construction, some of Defendant's objections are sufficiently definite to trigger the Court's obligation to conduct a de novo review. *See* 28 U.S.C. § 636(b)(1)(c). The Court has satisfied its duty, reviewing the entire record. For the following reasons, Defendant's objections (DE 85) will be **OVERRULED** and his motion for relief under § 2255 (DE 59) will be **DENIED**. After

reviewing Defendant's petition (DE 59), the R&R (DE 77), and the applicable law, the Court **ADOPTS** the R&R.

II. Remaining Ineffective Assistance of Counsel Claim.

Defendant has filed objections to the Magistrate's recommendation regarding only one of his claims for ineffective assistance of counsel. (*See* DE 85.) Defendant objects to the Magistrate's recommendation that Defendant's ineffective assistance of counsel claim predicated on Roberts' failure to file a motion to dismiss for violations of the Speedy Trial Act and Sixth Amendment be denied. Pursuant to 28 U.S.C. § 636(b), the Court conducts a de novo review of this claim.

In his petition, Defendant claims that his right to a Speedy Trial under 18 U.S.C. § 3161 and the Sixth Amendment were violated. (DE 59 at 6.) The Magistrate thoroughly addressed Defendant's claims and found that his claim for ineffective assistance of counsel on this ground was meritless.[1] The Magistrate first determined that there was a technical violation of the Speedy Trial Act. However, the Magistrate—assuming that Roberts' performance was deficient under *Strickland* without explicitly finding such—found that there was no resulting prejudice. Second, the Magistrate determined that there was no violation of Defendant's right to a speedy trial under the Sixth Amendment. As such, the Magistrate recommended that the Defendant's claim for ineffective assistance of counsel on this basis be denied. (DE 77 at 14-25.)

Defendant raises several objections to the Magistrate's calculation of time under the Speedy Trial Act and recommendation regarding this claim for ineffective assistance of

[1] Defendant has no direct claim for a violation of the Speedy Trial Act because he entered into a guilty plea to Count One of his Indictment. *See* 18 U.S.C. § 3162 ("Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.") Accordingly, the Court only considers the violation of the Speedy Trial Act as it relates to Defendant's claim for ineffective assistance of counsel.

counsel. (DE 85.) First, he asserts that the time excluded at docket entry 16 is improper. Second, Defendant appears to assert that he was in the custody of the Attorney General undergoing his psychological and psychiatric examinations for longer than permitted by statute. He further contends that there was no reason for the Court to grant an extension to the Warden of the Federal Medical Center ("FMC"), Lexington to complete those examinations. Third, he asserts that the R&R improperly states that Roberts' first appearance as counsel was on April 7, 2016. Instead, Defendant contends that Roberts was appointed December 29, 2015. Finally, Defendant argues—in response to the Magistrate's finding that there was no Sixth Amendment violation—that the delays in his case prejudiced him in various ways that should be considered by the Court. The Court addresses each of these objections below.

A. Two-prong Test for Establishing a Claim of Ineffective Assistance of Counsel.

To prevail on a claim of ineffective assistance of counsel, Defendant must satisfy the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, the Defendant must first establish that counsel's performance was deficient and then show that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Regarding the deficiency prong, Defendant "must identify specific 'acts or omissions [that] were outside the wide range of professionally competent assistance.'" *Borch v. United States*, 47 F.3d 1167 (6th Cir. 1995) (quoting *Id.* at 690). There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance…" *Strickland*, 466 U.S. at 689. To show prejudice, Defendant must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Sixth Circuit has interpreted *Strickland* as allowing a finding of ineffective assistance of counsel "only if [counsel's] performance below professional standards caused the defendant

to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). "When deciding ineffective-assistance claims, courts need not address both components of the [deficient performance and prejudice] inquiry 'if the defendant makes an insufficient showing on one.'" *Campbell v. United States*, 364 F.3d 727, 730 (6th Cir. 2004) (quoting *Strickland*, 466 U.S. at 697)).

Here, Defendant makes a claim for ineffective assistance of counsel on the basis that Roberts should have filed a motion to dismiss the indictment for violations of the Speedy Trial Act and Sixth Amendment. This claim for ineffective assistance of counsel fails because as Defendant's claim relates to a violation of the Speedy Trial Act, he has not shown prejudice under *Strickland*, and as Defendant's claim relates to a violation of his Sixth Amendment rights, he has not shown any deficient performance.

1. Ineffective Assistance of Counsel Claim as it Relates to a Violation of the Speedy Trial Act.

Defendant makes a claim for ineffective assistance of counsel based on a violation of the Speedy Trial Act. Defendant contends that his counsel was ineffective for failing to raise a violation of the Speedy Trial Act to this Court. (DE 59-1 at 7.)

The Court finds below—assuming that Roberts' performance was deficient under *Strickland*—that Defendant has not shown any prejudice. Accordingly, his ineffective assistance of counsel claim based on a violation of the Speedy Trial Act is meritless.

a. Timeline of Defendant's Case Under the Speedy Trial Act.

Under the Speedy Trial Act, a defendant is required to be tried within seventy days from the filing of an indictment or from the date of his first appearance before an officer of the court where the charges are pending, whichever occurred last. 18 U.S.C. § 3161(c)(1). The statute further provides, however, that certain periods of delay "shall be excluded" in computing the seventy-day time limitation. *Id.* § 3161(h). Excluded delays include "delay

resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant[,]" *Id.* § 3161(h)(1)(A); "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion[,]" *Id.* § 3161(h)(1)(D); and "[a]ny period of delay resulting from a continuance granted by any judge … if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." *Id.* § 3161(h)(7)(A).

As the Magistrate correctly stated in his R&R:

> Herman's indictment was filed on July 23, 2015, and his first appearance on the charges in the indictment occurred on July 27, 2015. Therefore, the triggering date for speedy trial purposes was July 27, 2015. So, when Herman appeared for arraignment on July 27, 2015[,] his time [under the Speedy Trial Act] began. However, several delays did arise and extended the time for his trial to occur as described below:
>
> 1. Clock starts on July 27, 2015 upon Herman's first appearance on [the] indictment.
>
> 2. Forty-eight (48) days run (July 28, 2015 – September 13, 2015)[.]
>
> 3. Clock stops on September 14, 2015 when defense moves for continuance of trial.
>
> 4. Clock starts on September 18, 2015 when Court grants continuance.
>
> 5. Nine (9) days run (September 19, 2015 – September 27, 2015)[.]
>
> 6. Clock Stops on September 28, 2015 through December 7, 2015 by virtue of being declared excludable[.] [R. 16].
>
> 7. November 17, 2015 Motion for Competency evaluation is filed.
>
> 8. April 7, 2016, Competency issue was resolved[,] and the case is scheduled for trial on May 16, 2016. The time between the filing of the motion for competency through and including the date of the hearing at which the issue was resolved (April 7, 2016) is declared excludable. [R. 30].
>
> 9. Clock starts on April 8, 2016.
>
> 10. Seventy (70) day clock runs on April 20, 2016.

> 11. Defendant moves for re-arraignment, having reached a plea agreement with the United States, on May 4, 2016, thirteen (13) days after [the] running of [the] Speedy Trial Clock. [R. 32].

(DE 77 at 15-16.)

Defendant raises two objections directly related to the Magistrate's calculation of time under the Speedy Trial Act. First, he asserts that the time excluded at docket entry 16 is improper. Second, Defendant appears to assert that he was in the custody of the Attorney General undergoing his psychological and psychiatric examinations for longer than permitted by statute. He further contends that there was no reason for the Court to grant an extension to the Warden of FMC, Lexington to complete those examinations. (DE 85 at 3-4.) Although these objections are ultimately immaterial to the Court's determination that the Defendant has not shown prejudice under *Strickland*, the Court addresses them to lay foundation and clarify the posture of the case.

i. The Time Excluded by Docket Entry 16 was Appropriately Excluded Under the Speedy Trial Act.

Defendant alleges in his objections that the time excluded at docket entry 16—September 28, 2015 through December 7, 2015—is improper because "no where in that whole space are the terms ends of justice met [*sic*]." Defendant additionally alleges that there is no legal or reasonable explanation for why that time should be excluded. (DE 85 at 3.)

Docket entry 16 grants the Defendant's own motion to continue. On September 14, 2015, Defendant moved to continue the September 28, 2015 trial date. (DE 15.) That motion stated as follows:

> Counsel for the Defendant has been attempting to gather documentation regarding the mental health of the Defendant in order to make a determination whether to request a full evaluation. At this point the Defendant would request a continuance of two months to afford him ample opportunity to obtain

> the records. This request is being made in an effort to determine the best way to proceed with the representation of the Defendant.

(DE 15 at 1.) The Court granted the motion and set a new trial date for December 7, 2015. (DE 16.) Based on the Defendant's representations to the Court in his motion to continue, the Court found that "pursuant to 18 U.S.C. § 3161(h)(1)(A) and 18 U.S.C. § 3161(h)(7)(A)[,] the time between the prior trial date and the new trial date should be excluded in computing the time that the trial of this matter must commence under the Speedy Trial Act." The Court additionally found that, pursuant to § 3161(h)(7)(A), "[f]ailure to grant this continuance would deny defense counsel the reasonable time necessary for effective preparation and, accordingly, the end[s] of justice served by [the] continuance outweigh the best interest of the public and the defendant in a speedy trial." (DE 16 at 1.)

As stated above, § 3161(h)(1)(A) provides that any period of "delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant" shall be excluded. 18 U.S.C. § 3161(h)(1)(A). Here, the basis of Defendant's motion to continue was the need for time to determine whether a full mental health evaluation would benefit the Defendant. Accordingly, the time was appropriately excluded under § 3161(h)(1)(A). The time was also excludable under § 3161(h)(7)(A). As stated above, § 3161(h)(7)(A) provides that any period of "delay resulting from a continuance granted by any judge … if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." *Id.* § 3161(h)(7)(A). Based on Defendant's representations in his motion to continue (DE 15), the Court appropriately made "ends of justice" findings on the record in docket entry 16. Those findings were based on the Court's determination that a failure to grant such continuance would deny the counsel for the Defendant the reasonable time necessary for effective preparation. (*See* DE 16.) *See also id.*

§ 3161(h)(7)(B) (The factors which a judge shall consider in determining whether to grant a continuance include "[w]hether the failure to grant such a continuance … would deny counsel for the defendant … the reasonable time necessary for effective preparation, taking into account the exercise of due diligence."). The time between September 28, 2015 and December 7, 2015 was appropriately excluded pursuant to § 3161(h). Accordingly, Defendant's objection to the Magistrate's R&R on this basis is overruled.

ii. The Time Excluded to Conduct the Defendant's Requested Psychological and Psychiatric Evaluations was Appropriately Excluded Under the Speedy Trial Act.

Regarding Defendant's second objection to the Magistrate's calculation of time under the Speedy Trial Act, Defendant appears to assert that he was in the custody of the Attorney General undergoing his psychological and psychiatric examinations for longer than permitted by statute. He further contends that there was no reason for the Court to grant an extension to the Warden of FMC, Lexington to complete those examinations. (DE 85 at 3-4.)

On November 17, 2015, Defendant filed a motion requesting pretrial psychological and psychiatric examinations pursuant to 18 U.S.C. §§ 4241, 4242(a), and Federal Rule of Criminal Procedure 12.2. (DE 17.) On November 30, 2015, the Court granted the Defendant's motion and ordered that the Defendant be committed to the custody of the Attorney General for a reasonable period of time not to exceed forty-five (45) days, unless otherwise ordered by the Court. (DE 20.) Subsequent to the Court's order, the Court received a letter from the Warden of FMC, Lexington requesting a 30-day extension to complete the evaluation of the Defendant. (DE 21-1.) In that letter, the Warden stated that although Defendant was ordered to undergo an evaluation on November 30, 2015, he did not arrive at FMC, Lexington until December 7, 2015. The Warden further stated:

> due to the large number of evaluations received at this facility and in order to allow our clinical staff sufficient time to conduct a thorough examination, we are respectfully requesting an extension which would allow us an additional

> 30 days to complete the evaluation. Under such a time frame, the evaluation would be completed by February 19, 2016, and a report would be available to the Court by March 18, 2016."

(DE 21-1 at 1.) On December 17, 2015, the Court issued an order granting the Warden's requested extension. (DE 21.)

Under § 4241(b), "the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c)." 18 U.S.C. § 4241. Under § 4242,

> [u]pon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

Id. § 4242. § 4247 provides the time limits under which a defendant may be examined pursuant to §§ 4241 and 4242. It provides:

> [f]or the purposes of an examination pursuant to an order under section 4241, … the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, … for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility … The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241 … and not to exceed thirty days under section 4242 … upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

Id. § 4247(b).

Defendant was committed to the custody of the Attorney General under the time limits permitted by the statute. The Court ordered that the Defendant undergo psychological and psychiatric examinations pursuant to §§ 4241 and 4242. (DE 20.) The Court appropriately ordered that the Defendant be committed to the custody of the Attorney General for a reasonable period of time not to exceed 45 days. *See* 18 U.S.C. § 4247(b). Additionally, the extension granted by the Court was appropriate pursuant to §

4247(b). The Warden of FMC, Lexington requested an extension because there had been a delay in Defendant's transport and due to the need to allow clinical staff sufficient time to conduct a thorough examination. (*See* DE 21-1.) The Warden's letter demonstrated "good cause" for extending the time to observe and evaluate the Defendant pursuant to § 4247(b). Although the Court did not explicitly state that it was granting the Warden's requested extension for good cause shown, such is implicit in the Court's order. (*See* DE 21.) Accordingly, the thirty-day extension to conduct Defendant's psychological and psychiatric examinations was also appropriate. *See* 18 U.S.C. § 4247(b).

The Court notes that even if there was a violation of the time limits permitted by § 4247(b), the entire time of the competency evaluation—from the filing of Defendant's motion for a competency evaluation on November 17, 2015 through the Court's resolution of that motion on April 7, 2016—is excludable under §§ 3161(h)(1)(A) and 3161(h)(1)(D). *Id.* §§ 3161(h)(1)(A) (Excluded delays include "delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant[.]"); and 3161(h)(1)(D) ("Excluded delays include "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion[.]"). The Sixth Circuit has consistently held that delays resulting from proceedings to determine a defendant's competency are properly excluded from calculation under the Speedy Trial Act. *See United States v. Jackson*, 179 F. App'x 921, 933–34 (6th Cir. 2006); *United States v. Cope*, 312 F.3d 757, 777 (6th Cir. 2002); *United States v. Murphy*, 241 F.3d 447, 455–56 (6th Cir. 2001) (and cases cited therein). Additionally, the Sixth Circuit, like other circuits, "has refused to use the [Speedy Trial] Act to craft remedies for alleged violations of 18 U.S.C. § 4247's time limitations." *See Jackson*, 179 F. App'x at 934 (citing *Murphy*, 241 F.3d at 456–57 (and

citations therein); *United States v. Taylor*, 353 F.3d 868, 870 (10th Cir.2003)). Based on Sixth Circuit precedent, even if there was a violation of § 4247's time limitations here, the relevant time period is still appropriately excluded under the Speedy Trial Act.

In the R&R, the Magistrate—pursuant to the Speedy Trial Act—appropriately excluded the time taken to conduct the Defendant's requested psychological and psychiatric examinations. Additionally, the Court finds that there was no violation of the time limits for such examinations provided by § 4247. But even if there was such violation, Defendant is not entitled to any remedy. Accordingly, Defendant's objection to the Magistrate's R&R on this basis is overruled.

b. Applying the Two-Prong Test of *Strickland* to the Present Case.

Since there appears to be a violation of the Speedy Trial Act, the Court will assume—without explicitly finding—that counsel's performance was deficient. *See Sylvester v. United States*, 868 F.3d 503, 511 (6th Cir. 2017) (The Sixth Circuit held that because the Speedy Trial Act was violated and the violations would have led to dismissal of the charges, defendant's counsel rendered deficient performance by not bringing those violations to the attention of the trial or appellate court.). Like in *Sylvester*, Defendant's claim for ineffective assistance of counsel fails, however, because he has not shown that he was prejudiced by any deficient performance. *See id.* ("Although we find that Sylvester's counsel rendered deficient performance in not pursuing the Speedy Trial Act argument, we nevertheless deny Sylvester's § 2255 motion because Sylvester was not prejudiced by his counsels' inaction.").

To show prejudice for an ineffective assistance of counsel claim where there has been a violation of the Speedy Trial Act and counsel's performance in raising that violation was deficient, the defendant must demonstrate by a reasonable probability that the deficient performance changed the result of the proceeding. *See Strickland*, 466 U.S. at 694. In this

context, the Defendant must show that "but for his trial [or] appellate attorneys' unprofessional errors, the district court or [appellate] court on direct appeal would have ordered dismissal of the prosecution *with prejudice* based on a Speedy Trial Act Violation." *Sylvester*, 868 F.3d at 511 (quoting *McAuliffe v. United States*, 514 Fed. Appx. 542, 546 (6th Cir. 2013) (emphasis added)).

Defendant has not shown that but for his counsel's deficient performance, this Court or the Sixth Circuit Court of Appeals would have ordered dismissal of his case *with prejudice* based on a violation of the Speedy Trial Act. Under 18 U.S.C. § 3162(a)(2), a district court has discretion to determine whether to dismiss a case with or without prejudice based on consideration of various factors. 18 U.S.C. § 3162(a)(2). "The court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." *Id.* Defendant does not discuss any of these factors in his objections to the R&R, however, the Court considers below the factors listed in § 3162(a)(2) and finds that none of the factors weigh in favor of dismissal with prejudice.

Regarding the first factor—the seriousness of the offense—the Defendant has been accused of very serious sex crimes involving his six-year-old daughter. Defendant was indicted on one count of production of child pornography, one count of distributing child pornography, and one count of possession of child pornography. (DE 9.) Defendant ultimately admitted in his plea agreement that he produced child pornography, resulting in a sentence of 300-months imprisonment. (DE 36 and 44.) The length of the sentence alone evidences the true seriousness of the offenses involved. *See United States v. Robinson*, 389 F.3d 582, 588 (6th Cir. 2004) ("Given the length of the sentence, the offenses charged against Robinson were serious and favored dismissal without prejudice."); *United States v. Koerber*,

813 F.3d 1262, 1276 & n. 19 (10th Cir. 2016) (The seriousness of the offense may be assessed "by considering the length of sentence Congress has adopted[.]"). Considering the seriousness of the offenses alleged, this factor weighs heavily in favor of dismissal *without prejudice*.

Regarding the second factor—the facts and circumstances of the case which would have led to dismissal—the Court considers the culpability of the conduct that led to the delays in this case. *See Koerber*, 813 F.3d at 1277. As the Court stated above, there was a thirteen-day violation of the Speedy Trial Act that occurred in this case. However, there is absolutely no evidence of intentional dilatory conduct, bad faith, or a pattern of prosecutorial neglect resulting in the violation of the Speedy Trial Act. Notably, no delays in this case were caused by the government. Instead, all the delays in this case—including those excludable under the Speedy Trial Act—were caused by motions filed on Defendant's behalf.

The thirteen-day delay of the Speedy Trial Act that occurred here appears to have been caused by appointment of new counsel and the need to consider how the results of the Defendant's psychological and psychiatric examinations affected the trajectory of his case. On April 7, 2016, the Court held a competency hearing to discuss the results of the Defendant's requested competency evaluation. (*See* DE 30.) Roberts—who was drawn by the Clerk of Court as counsel for the Defendant on December 29, 2015 while Defendant was actively undergoing his requested psychological and psychiatric examinations—made his first courtroom appearance on behalf of the Defendant on that day.[2] At that hearing, no party

[2] Defendant asserts in his objections that the R&R incorrectly states that Roberts' first appearance as counsel for Defendant was on April 7, 2016, when only thirteen (13) days remained on the speedy trial clock. Defendant contends that Roberts was appointed on December 29, 2015. (DE 85 at 3.)

This objection is immaterial as it a factual distinction that does not affect the Magistrate's decision or analysis. Roberts was officially drawn as counsel for the Defendant by the Clerk of Court on December 29, 2015. At the time Roberts was officially drawn as counsel for the Defendant, Defendant was actively undergoing a psychological and psychiatric evaluation at FMC Lexington. Counsel's first official, courtroom appearance on behalf of the Defendant was on April 7, 2016, at the Defendant's competency hearing. The Magistrate simply and accurately points out in his R&R that on April 7, 2016, Roberts made his first official, courtroom appearance on behalf of the Defendant. As the Magistrate correctly points out, the April 7, 2016

mentioned that Defendant's speedy trial clock was set to expire in less than two weeks, on April 20, 2016. *See Zender v. United States*, 547 U.S. 489, 502 (2006) (Generally, a defendant has the role of identifying and bringing to the court's attention a speedy trial violation prior to trial or entry of a guilty plea to prevent undue defense gamesmanship.).

As the Magistrate stated in his R&R:

> Roberts' choice was to insist on going to trial prior to the deadline's expiration which would require him to prepare the entire case for trial in less than two weeks or accept a later trial date … Clearly, forcing Roberts to fashion a defense and proceed to trial in a case new to him, having only just met his client and addressed the competency issue would raise the issue of whether, in doing so, he would be forced into circumstances resulting in ineffective assistance of counsel for not seeking a delay or continuance. In addition, counsel should not be expected to lie in wait those thirteen days for the deadline to pass and then spring a motion of dismissal on the Court on April 21, 2016. *United States v. Miller*, No. 05-143, 2018 WL 6308786, *9 (D.D.C. Dec. 3, 2018) ("trial counsel should understand the court's frustration at an attorney agreeing to a date in the future, silently lying in wait for a STA violation, and then filing a motion to dismiss on the STA violation").

(DE 77 at 20-21.) The facts and circumstances of this case which would have led to dismissal of the charges were not intentional or prejudicial to the Defendant. As such, this factor also weighs heavily in favor of dismissal without prejudice.

Finally, regarding the third factor—the impact of a reprosecution on the administration of this chapter and on the administration of justice—"'[t]he main considerations that courts have taken into account ... are whether the defendant suffered actual prejudice as a result of the delay, and whether the government engaged in prosecutorial misconduct that must be deterred to ensure compliance with the Act.'" *Sylvester*, 868 F.3d at 512 (citing *United States v. Howard*, 218 F.3d 556, 562 (6th Cir. 2000)).

competency hearing occurred with only 13 days remaining on the speedy trial clock. This distinction, however, is immaterial as the Magistrate ultimately concluded there was a violation of the Speedy Trial Act.

Defendant presents no argument nor evidence supporting that he was prejudiced by the thirteen-day delay. Additionally, the Defendant presents no argument nor evidence that the government engaged in prosecutorial misconduct delaying the proceedings. As such, the Court finds that the third factor also weighs in favor of dismissal without prejudice.

Defendant has failed to show that he suffered any prejudice under *Strickland* because he has not established a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 694. Defendant has not shown that "but for his trial [or] appellate attorneys' unprofessional errors, the district court or [appellate] court on direct appeal would have ordered dismissal of the prosecution *with prejudice* based on a Speedy Trial Act Violation." *See Sylvester*, 868 F.3d at 511 (quoting *McAuliffe*, 514 Fed. Appx. at 546 (emphasis added)). Instead, the facts and circumstances here support that the case would have been dismissed without prejudice. Each of the factors that the Court "shall consider" pursuant to § 3162(a)(2) strongly support that the case would have been dismissed without prejudice. Accordingly, the Court finds that Defendant's claim for ineffective assistance of counsel on this basis must fail.

2. Ineffective Assistance of Counsel Claim as it Relates to Defendant's Alleged Violation of his Sixth Amendment Right to a Speedy Trial.

Defendant also asserts ineffective assistance of counsel based on Roberts' failure to file a motion to dismiss the indictment due to an alleged violation of his Sixth Amendment right to a speedy trial. (DE 59-1 at 7.) The Court finds that Defendant's claim for ineffective assistance of counsel on this basis must fail because Defendant's Sixth Amendment right to a speedy trial was not violated.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend VI. A defendant's Sixth Amendment right to a speedy trial is distinct from his

rights under the Speedy Trial Act. *See Howard*, 218 F.3d at 563-64 ("'Although the passage of the [Speedy Trial] Act was in part an attempt by Congress to quantify the Sixth Amendment right to a speedy trial, the legislation does not purport to be coextensive with that amendment.'") (citing *United States v. Gonzalez*, 671 F.2d 441, 443 (11th Cir. 1982); *see also* 18 U.S.C. § 3173 ("No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution."); *United States v. Rice*, 746 F.3d 1074, 1081 (D.C. Cir. 2014) ("The absence of a Speedy Trial Act violation does not ipso facto defeat a Sixth Amendment speedy trial claim."). A violation of a defendant's rights under the Speedy Trial Act may be found where there was no violation of that defendant's right to a speedy trial under the Sixth Amendment. *See United States v. White*, 443 F.3d 582, 588 (7th Cir. 2006) (citing *United States v. Koller*, 956 F.2d 1408, 1413 (7th Cir. 1992)). Determining compliance with the Speedy Trial Act is a question of statutory interpretation, while determining compliance with the Sixth Amendment is guided by the Supreme Court's decision in *Barker v. Wingo*, 407, U.S. 514 (1972). *Gonzalez*, 671 F.2d at 442-43.

In *Barker*, the Supreme Court identified four factors that courts should consider in determining whether a defendant's Sixth Amendment right to a speedy trial has been violated: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530. The first factor—length of delay—is a threshold requirement. *United States v. Williams*, 753 F.3d 626, 632 (6th Cir. 2014). "[I]f the length of the delay is not uncommonly long, then the judicial examination ends." *United States v. Bass*, 460 F.3d 830, 836 (6th Cir.2006) (internal citation and quotation marks omitted). A delay of one year or more is considered presumptively prejudicial, triggering the examination of the other factors. *Id.* "'In calculating the length of the delay,

only those periods of delay attributable to the government or the court are relevant to the defendant's constitutional claim.'" *United States v. Williams*, 683 F. App'x 376, 383 (6th Cir. 2017) (citing *Howard*, 218 F.3d at 564); *see also United States v. White*, 985 F.2d 271, 275 (6th Cir. 1993) (Court excluded the time during which the defendant "expressly participated in the delay" from the time counted towards a Sixth Amendment violation.) "'The length of delay is measured from the earlier of the date of indictment or arrest to the defendant's trial.'" *Id*. (citing *Bass*, 460 F.3d at 836). "To trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay…." *Id.* (citing *Doggett v. United States*, 505 U.S. 647, 651-52 (1992)).

Defendant has not provided any argument or evidence that the length of delay in his case was presumptively prejudicial. Unlike the Speedy Trial Act, this calculation begins at the day of Defendant's arrest on June 23, 2015. *See id*. Defendant filed a motion for rearraignment on May 4, 2016, stopping the clock. (DE 32.) Thus, three hundred sixteen (316) days passed between Defendant's arrest on June 23, 2015 and his motion for rearraignment on May 4, 2016. Although three hundred sixteen (316) days passed between Defendant's arrest and his motion for rearraignment, the length of delay is even less considering that "only those periods of delay attributable to the government or the court are relevant to the defendant's [Sixth Amendment] claim." *See Williams*, 683 F. App'x at 383. The Defendant "expressly participated in the delay[s]" of his case when he filed a motion for continuance and motion for a competency evaluation. After excluding the delays caused by the Defendant, there are one hundred twenty-four (124) days attributable to the trial process. Defendant has not shown a delay of more than one year or alleged that the delays "crossed

the threshold dividing ordinary from 'presumptively prejudicial' delay." *See id.* (citing *Doggett*, 505 U.S. at 651-52). As the Magistrate stated:

> If the optimal trial process and normal procedure would take seventy (70) days, then fifty-four (54) days is the maximum time [Defendant] can claim as a delay. These same fifty-four (54) days include the time between arrest and indictment and the time for his second attorney, Roberts, to prepare for trial and/or negotiate the plea agreement. Therefore, as the time of any delay was less than one-and-one-half-month this is clearly not a violation of 6th Amendment right to a speedy trial.

(DE 77 at 24.) Since the length of delay in this case is not "uncommonly long" judicial examination of Defendant's Sixth Amendment claim ends. *See Bass*, 460 F.3d at 836.

In Defendant's objections, he argues that the *Barker* factors must be considered in conjunction with other factors under *Moore v. Arizona*, 414 U.S. 25 (1973). (DE 85 at 5.) Defendant states that he was prejudiced because he was "never released to go and try to get his affairs in order, was notallowed to work a job to support his family, he was subject to the feawr, worry, and concern that his family was in danger of becoming homeless [*sic*]." Defendant further states that he was "isolated, estranged from family and friends, had no way of 'assisting his attorney in his defense', he was denied bail, so he had no way to ensure his family and finances would be properly taken care of during his absence [*sic*]." (DE 85 at 5.)

Defendant has not shown any violation of his Sixth Amendment right to a speedy trial, and thus, he cannot prove his ineffective assistance of counsel claim on this basis. None of the *Barker* factors evidence a Sixth Amendment speedy trial violation: (1) Defendant has not shown that the length of delay was uncommonly long; (2) Defendant was the reason for the delays in his case and no delays were caused by the government; (3) Defendant did not promptly, forcefully, or diligently assert his right to a speedy trial and did not even mention his right to a speedy trial until filing his motion to vacate under 28 U.S.C. § 2255; and (4)

Defendant has not shown prejudice.[3] Defendant urges the Court to consider various alleged "prejudices" in his objections. However, the "prejudices" cited by the Defendant in his objections are simply inherent inconveniences of incarceration. Even taking Defendant's objections into account, he falls considerably short of showing a Sixth Amendment violation. Since the facts and circumstances of this case do not show any violation of Defendant's Sixth Amendment right to a speedy trial, Defendant cannot show that his counsel was deficient for failing to raise such violation. As such, his claim for ineffective assistance of counsel on this basis must fail.

III. Other Assertion's in Defendant's Objections to the Magistrate's R&R.

In Defendant's objections to the Magistrate's R&R he states that he would like the Court to consider correspondence between Roberts and himself. Defendant then alleges that at his sentencing, a United States Marshal told him that he "better hope not to file an appeal in this court" and that if he did "the Marshal knew people in the court" and would make sure Defendant "never breathed [*sic*] a free breath of air again." (DE 85 at 8.) Defendant states that he told Roberts about this incident and Roberts was unwilling to assist him. He submits the correspondence as evidence that Roberts was unwilling to help. In the correspondence, Roberts stated, "if you want the name and badge number [of the Marshal] that was present at your sentencing, you would have to request that directly from the U.S. Marshalls [*sic*]. I am not going to get involved in that issue because it is totally irrelevant and has no adverse effect on your detention status." (DE 85-1 at 1.)

[3] Although Defendant cites to various inconveniences and distress caused by incarceration, he has not shown prejudice. The final factor—prejudice to the defendant—considers the interests which the speedy trial right was designed to protect. *Barker*, 407 U.S. at 532. Such interests include preventing oppressive pretrial incarceration, minimizing anxiety and concern of the accused, and, most significantly, limiting the possibility that defense will be impaired. *Id.* Defendant has not alleged oppressive pretrial incarceration, significant anxiety or concern, or that his defense was somehow impaired. In fact, Defendant ultimately pleaded guilty to production of child pornography and received a 300-month sentence.

The Court fails to see how this correspondence supports any of Defendant's claims for ineffective assistance of counsel. Moreover, the incident alleged by the Defendant is completely irrelevant to Roberts' representation of the Defendant. Accordingly, the Court will not further consider this correspondence as support for Defendant's claims of ineffective assistance of counsel.

IV. Defendant's Response to the Court's Order Denying his Motion to Amend his 28 U.S.C. § 2255 Petition.

Defendant has also filed a response to the Court's order denying his motion to amend his § 2255 petition. (DE 102.) On June 7, 2019, the Defendant filed a motion to amend his § 2255 petition based on "newly discovered evidence." He further requested sixty (60) days to amend his petition. (DE 90.) On July 18, 2019, the Court denied the motion to amend because it was completely devoid of information regarding the amendment he sought. (DE 92.) Based on the information provided in the motion, the Court was unable to determine whether amendment of his § 2255 would be appropriate. Thereafter, Defendant filed a motion to reconsider. (DE 93.) In that motion, the Defendant stated that the reason he sought to amend his § 2255 petition was because he discovered that copies of a search warrant were not filed in the record of his case. He states that he "believes now that his Constitutional Rights were violated[.]" (DE 93 at 1.) He further stated that he prepared an amendment for the Court to consider, however, he did not file an amendment at that time. On October 22, 2019, the Defendant tendered an amendment. (DE 94.) In that filing, Defendant articulated for the first time that he wished to bring a claim for ineffective assistance of counsel against Gore and Roberts because they never "brought up the fact that the Government never produced a search warrant." (DE 94 at 2.)

In response to Defendant's filings, the Court issued an opinion and order construing Defendant's motion to reconsider (DE 93) and the tendered amendment (DE 94) as a renewed

motion to amend his § 2255 petition. (DE 95 at 1.) The Court ordered that Defendant could not amend his § 2255 because the new claim was time barred under the statute of limitations and amendment was not appropriate under Federal Rule of Civil Procedure 15(c). The Court stated:

> In situations where the statute of limitations has run, the Court must determine whether any amendment to the Defendant's § 2255 petition relates back to the claims made in his initial petition. *See* Fed. R. Civ. P. 15(c). 28 U.S.C. § 2255(f) provides that there is a one-year statute of limitations for motions under § 2255 that begins running from the latest of (1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(DE 95 at 2.) Because more than one year had passed since the judgement of conviction had become final, the Court found that Defendant's initial motion to amend, renewed motion to amend, and tendered amendment could be construed as an invocation of § 2255(f)(4). The Court then determined that it need not decide the applicability of § 2255(f)(4) because even if § 2255(f)(4) was applicable, renewing the one-year statute of limitations, the new statute of limitations was already expired before Defendant sought an amendment. The Court explained:

> '[t]he one-year period of limitation commences … when the factual predicate of a claim could have been discovered through the exercise of due diligence, not when it actually was discovered.' *Schlueter v. Varner*, 384 F.3d 69, 74 (3d Cir. 2004). Under § 2255(f)(4), the "due diligence" required is reasonable diligence in discovering the factual predicate of the claim. *DiCenzi v. Rose*, 452 F.3d 465, 470 (6th Cir. 2006). Additionally, the Defendant bears the burden to prove that he exercised due diligence to start a new statute of limitations. *Id.* at 471.
>
> Here, Defendant's proffered amendment contains a new ineffective assistance of counsel claim based on the Defendant's discovery that the search warrant was not filed in the record of his case. Arguably[,] Defendant could have discovered that the search warrant was not filed in his case as early has his

> initial appearance, although such finding is not necessary here considering the Defendant actually knew of the factual predicate of his claim over a year before he filed his initial motion to amend, renewed motion to amend, and tendered amend[ment]. It appears that the Defendant first asked for a copy of his search warrant by way of letter filed on March 6, 2018. (DE 57.) On the same date, the Clerk of the Court informed the Defendant that "search warrants … are not filed in the record." (DE 57-2.) Thus, the Defendant had knowledge of the factual predicate of his claim upon his receipt of the Clerk's letter. Defendant did not file a motion to amend his § 2255 until June 7, 2019—well over a year after the Clerk's office informed him that the search warrant was not filed in the record. (*See* DE 90.) But even then, Defendant did not assert his claim for ineffective assistance of counsel based on his counsels' failure to challenge the existence of the search warrant … It was not until July 30, 2019 that the Defendant first articulated to the Court that he wished to amend his petition to add a claim based on the absence of the search warrant. (DE 93 at 1.) And it was not until October 22, 2019—when the Defendant filed his tendered amendment—that the Defendant fully articulated that he wished to bring a claim for ineffective assistance of counsel based on counsels' failure to challenge the existence of the search warrant. (*See* DE 94.) Thus, even if the one-year statute of limitations renewed upon Defendant's discovery that the search warrant was not filed in his case, it would have lapsed well-before he filed his motion to amend on June 7, 2019, renewed motion to amend on July 30, 2019, and tendered amendment on October 22, 2019.

(DE 95 at 2-4.) Since the statute of limitations for Defendant's claim had unequivocally expired, the Court went on to determine whether Defendant's proffered claim related back to the claims made in his initial § 2255 petition. *See Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) (Motions to amend a § 2255 petition after the expiration of the statute of limitations will be barred "unless the proposed amendment relates back to the date of the original pleading within the meaning of Rule 15(c)(2)."). The Court found that the Defendant's ineffective assistance of counsel claim based on his counsels' failure to challenge the search of his residence did not relate back to his original § 2255 petition because it did not arise from the same conduct, transactions, or occurrences addressed by the claims in his initial petition. (DE 95 at 4-5.) Instead, the tendered amendment asserted an entirely new claim for ineffective assistance of counsel based on a different set of facts than those addressed by his original petition. (*See* DE 59 and 94.) Accordingly, the Court found that amendment was not warranted.

Defendant appealed the Court's opinion and order and filed a motion for leave to appeal in forma pauperis.[4] The Sixth Circuit promptly dismissed the appeal for lack of jurisdiction. (DE 101.)

Following the Sixth Circuit's dismissal, Defendant filed a response to the opinion and order denying the motion to amend in this Court. (DE 102.) In that filing, the Defendant appears to assert that the Court inappropriately determined that the claim in his tendered amendment was time barred under § 2255. Defendant does not contend, however, that his new claim for ineffective assistance of counsel relates back to his original petition. The Court will construe the response as a motion to reconsider.

"Courts presented with motions for reconsideration in criminal cases typically evaluate those motions under the same standards applicable to a civil motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure." *Roberts v. United States*, No. 1:06 CR 416, 2011 WL 2982036, at *1 (N.D. Ohio July 21, 2011) (citing *United States v. Holtzhauer*, No. 2:05 CR 170, 2006 WL 1582444, at *1 (S.D. Ohio June 8, 2006)). Motions to reconsider are only granted if there was (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice. *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005).

Here, Defendant's motion to reconsider is not based on any evidence discovered since the Court issued the opinion and order denying his motion to amend. Additionally, Defendant does not allege an error of law or an intervening change in controlling law. Instead, Defendant's response asserts that the Court made a factual error in determining when he discovered that the search warrant was not filed in his case. (*See* DE 102 at 1-2.)

[4] The motion to appeal in forma pauperis (DE 98) is not necessary and has since become moot. The motion is accordingly denied as moot.

Defendant has also not shown any manifest injustice, and accordingly, his motion to reconsider is denied. Manifest injustice has been defined as "[a]n error in the trial court that is direct, obvious, and observable." *Tenn. Protection & Advocacy, Inc. v. Wells*, 371 F.3d 342, 348 (6th Cir. 2004) (quoting Black's Law Dictionary 974 (7th ed.1999). "'[A] showing of manifest injustice requires that there exist a fundamental flaw in the court's decision that without correction would lead to a result that is both inequitable and not in line with applicable policy.'" *United States v. Jarnigan*, No. 3:08-CR-7, 2008 WL 5248172, at *2 (E.D. Tenn. Dec. 17, 2008) (quoting *McDaniel v. Am. Gen. Fin. Servs., Inc.*, No. 04–2667 B, 2007 WL 2084277, at *2 (W.D. Tenn. July 17, 2007).

Here, Defendant contends that the Court incorrectly determined when he discovered that the search warrant was not filed in the record of his case. Defendant further states that he "never asked for a copy of the search warrant until May 20, 2019." (DE 102 at 2.) Defendant's assertions, however, are directly contradicted by the record of this case.

On March 6, 2018, the Court received a letter from the Defendant, which stated: "I need a copy of my search warrant, public docket, the copy of my miranda rights, and an unredacted copy of my indictment." (DE 57.) On the same date, the Clerk of the Court mailed a letter to the defendant stating that "search warrants … are not filed in the record." (DE 57-2.)

"The one-year period of limitation commences … when the factual predicate of a claim could have been discovered through the exercise of due diligence, not when it actually was discovered." *Schlueter v. Varner*, 384 F.3d 69, 74 (3d Cir. 2004). The Court found in its previous opinion and order that Defendant was given actual, explicit notice of the factual predicate of his claim when he received the letter from the Clerk of Court stating that "search warrants … are not filed in the record." (DE 95 at 3.) Even though Defendant was given actual, explicit notice upon receipt of the Clerk's letter, Defendant could have, with due

diligence, discovered the factual predicate of his claim much earlier on in his case. In fact, the very first docket entry of this case—the Criminal Complaint and accompanying affidavit—lays out probable cause and states that "[o]n June 23, 2015, at approximately 2:32 a.m., … a search warrant [was obtained] from a Fayette District Court Judge for the residence of Cody Lee Herman, 2111 Lansill Road, Building G, Apartment 76, Lexington, Kentucky 40504." (DE 1-1 at 9.) The Criminal Complaint and accompanying affidavit were sworn to by a Federal Bureau of Investigation Task Force Officer before a Magistrate judge. If Defendant had any concern that there was an inappropriate search in his case, he should have raised that issue with his trial attorneys. Aside from Defendant's alleged discovery that the search warrant was not filed in the record of his case and insinuations that a search warrant never existed, there is absolutely no indication that an inappropriate search was conducted in this case.

Defendant's motion to reconsider is denied because he has not shown a clear error of law, newly discovered evidence, an intervening change in controlling law, or a need to prevent manifest injustice. As the Court found in its previous opinion and order denying the Defendant's motion to amend, the statute of limitations has expired on Defendant's claim for ineffective assistance of counsel based on his counsels' failure to challenge the search of his residence.[5] His claim on this basis also does not relate back to any of the claims made in his

[5] Even if Defendant's claim for ineffective assistance of counsel on this basis was permitted to proceed, it would be denied because Defendant has not shown that counsel's performance was deficient. *See Strickland*, 466 U.S. at 687. To show deficient performance, the Defendant "must identify specific 'acts or omissions [that] were outside the wide range of professionally competent assistance.'" *Borch*, 47 F.3d at 1167 (quoting *Strickland*, 466 U.S. at 690)). Other than the fact that the search warrant was not filed in the record of this case, there is nothing to support that the Defendant had any valid challenge to the search of his residence. The facts of this case leading to the search of Defendant's residence, which are laid out in the affidavit accompanying Criminal Complaint, support that probable cause for a search existed. (*See* DE 1-1 at 2-9.) As such, Defendant has not shown that his attorney's performance was deficient. His claim for ineffective assistance of counsel on this basis is meritless.

initial § 2255 petition. (*See* DE 59.) As such, the Court properly denied Defendant's motion to amend.

CONCLUSION

Based on the foregoing, the Court **HEREBY ORDERS** as follows:

(1) United States Magistrate Judge Edward B. Atkins' Report and Recommendation (DE 77) is **ADOPTED** and **INCORPORATED** herein by reference;

(2) Defendant Cody Herman's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (DE 59) is **DENIED**;

(3) Defendant's objections (DE 85) are **OVERRULED**;

(4) Judgment shall be entered contemporaneously with this Order;

(5) A Certificate of Appealability **SHALL NOT ISSUE** because the Defendant has not made a substantial showing of the denial of a Constitutional right. *See* 28 U.S.C. § 2253(c).

(6) Defendant's pending motion to proceed in forma pauperis (DE 98) is **DENIED AS MOOT**; and

(7) Defendant's response to the Court's opinion and order construed as a motion for reconsideration (DE 102) is **DENIED**.

Dated June 1, 2020

Karen K. Caldwell

KAREN K. CALDWELL
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF KENTUCKY

No. 20-5618

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 12, 2020
DEBORAH S. HUNT, Clerk

CODY LEE HERMAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: GRIFFIN, Circuit Judge.

Cody Lee Herman, a federal prisoner proceeding through counsel, appeals the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. Herman has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1).

Following an online investigation by an undercover officer during which Herman expressed that he had nude pictures of his six-year-old daughter to trade, Herman was arrested and indicted on one count of production of visual depictions of a minor engaged in sexually explicit conduct using means of interstate commerce (Count 1); distribution of visual depictions of minors engaged in sexually explicit conduct (Count 2); possession of visual depictions of minors engaged in sexually explicit conduct that had been transported in interstate commerce (Count 3); and a forfeiture allegation. The district court subsequently granted a motion by Herman for a competency hearing, where Herman was determined competent to proceed with his legal case and not to have been suffering from symptoms of a chronic or severe mental illness at the time of the alleged offense.

Two months later, the parties entered a plea agreement that provided that Herman would plead guilty to Count 1 and the government would dismiss the remaining counts. The agreement provided that several enhancements to Herman's base offense level of 32 would apply, including

enhancements for the age of the victim, and the facts that the offense involved sexual conduct and depictions of violence and that the offender was the victim's parent. The agreement also provided that Herman would waive his right to appeal his guilty plea and conviction. Following a hearing, the district court accepted Herman's guilty plea to Count 1.

A presentence report calculated Herman's base offense level as 32. The report also added all of the enhancements outlined in Herman's plea agreement, as well as an additional two-level enhancement for the fact that the offense involved distribution, for a total offense level of 43. Coupled with a criminal history category of I, Herman's guidelines range of imprisonment was calculated as life, but because the statutory maximum term of imprisonment was 30 years (360 months), that became the applicable guidelines range of imprisonment. The report recommended a sentence of 300 months. Neither party filed objections to the report.

At Herman's sentencing hearing, he argued that a sentence of fifteen years—the statutory minimum—would provide just punishment, given that he needed supervision and counseling to overcome his compulsions. Herman's counsel explained that Herman had been abused as a child and had suffered trauma while on military duty in Iraq. The district court ultimately imposed a 300-month term of incarceration, to be followed by a 360-month term of supervised release.

On direct appeal, counsel filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 744 (1967). After an independent review of the record, this court determined that no good-faith issues existed for appeal, granted counsel's motion, and affirmed the judgment of the district court. *United States v. Herman*, No. 16-6386 (6th Cir. July 20, 2017).

Herman, proceeding pro se, then filed a § 2255 motion to vacate, asserting claims that attorney Charles Gore was ineffective for (1) failing to have Herman sent for a psychiatric evaluation, (2) failing to properly file paperwork, and (3) withdrawing without cause. Herman also alleged that the attorney who replaced Gore after he withdrew, H. Wayne Roberts, was ineffective for (4) failing to properly file paperwork with the court; (5) failing to bring to the court's attention the use of duress during plea negotiations (including threats that Herman's wife could be charged); (6) failing to move to dismiss the indictment based on Speedy Trial Act and Sixth Amendment violations; (7) improperly filing an *Anders* brief on appeal; (8) failing to argue for a

downward departure under USSG § 5K2.0 based on Herman's psychological evaluation and his military service; (9) failing to inform the court at sentencing that he had already been incarcerated for a year; and (10) failing to argue that he was induced to take pictures of the victim, which resulted in an enhanced sentence. The government filed a response, and Herman filed a reply.

A magistrate judge reviewed the pleadings and concluded that all of Herman's claims lacked merit, finding that the record either refuted Herman's claims or that he failed to demonstrate that he suffered prejudice as the result of counsel's performance. On the issue of a statutory speedy trial violation in particular, the magistrate judge concluded that a violation of the Speedy Trial Act occurred, calculating that a plea agreement between the parties was reached thirteen days after the seventy-day limit (absent excludable delays). However, the magistrate judge concluded that Herman could not establish that he was prejudiced by counsel's failure to move to dismiss the indictment based upon the technical violation because, due to the seriousness of the charges and the fact that all of the delays were caused by Herman, there was no reasonable probability that the district court would have dismissed the case with prejudice. . The magistrate judge further found that there was no violation of Herman's right to a speedy trial under the Sixth Amendment. The magistrate judge therefore recommended denying Herman's motion to vacate.

Herman filed objections but challenged only the magistrate judge's conclusions regarding his claim that counsel was ineffective for failing to file a motion to dismiss on the basis of a Speedy Trial Act and Sixth Amendment violation. The district court overruled Herman's objections, adopted the magistrate judge's report and recommendation, denied Herman's motion to vacate, and declined to issue a COA.

Through counsel, Herman now seeks a COA from this court, alleging that he "received ineffective assistance of counsel during plea and sentencing." In particular, Herman argues that counsel performed ineffectively by meeting with Herman for ten minutes before he entered a plea, advising Herman that his wife could be charged if he did not enter a plea, failing to investigate the search of Herman's residence or whether the statements he made to authorities were improperly obtained, and failing to advise Herman that his right to a speedy trial had been violated and to move to dismiss the indictment. Herman also asserts that his plea colloquy was incomplete. With

respect to sentencing, Herman argues that counsel was ineffective for failing to request a mitigating-role adjustment under USSG § 3B1.2 and failing to present "legitimate" arguments that Herman's offense was out of character for him and that, at the time of the offense, he was suffering from diminished mental capacity as the result of depression and Post-Traumatic Stress Disorder. The government has filed a response in opposition to Herman's application, noting that—although Herman's COA application does not address the issue—he filed objections regarding only counsel's performance as it related to his speedy trial claims. The government argues that any other claims are waived and that exceptional circumstances are not present that would justify disregarding the waiver.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He may do so by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). "[A] COA does not require a showing that the appeal will succeed," *id*. at 337; it is sufficient for a petitioner to demonstrate that "the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (citing *Slack*, 529 U.S. at 484).

As the government argues, a party must file specific objections to a magistrate judge's report in order to preserve the right to appeal a subsequent order of the district court adopting and approving that report. *See Howard v. Sec'y of Health & Human Servs*., 932 F.2d 505, 508 (6th Cir. 1991). In this case, Herman objected only to the magistrate judge's recommendation to deny his claim that counsel was ineffective for failing to file a motion to dismiss based on violations of the Speedy Trial Act and the Sixth Amendment. Accordingly, reasonable jurists could not debate that he forfeited consideration of the remainder of his claims. *Carter v. Mitchell*, 829 F.3d 455, 472 (6th Cir. 2016).

Moreover, although Herman objected to the magistrate judge's conclusions that counsel was not ineffective for failing to move to dismiss the indictment on the basis of a violation of the Speedy Trial Act and his Sixth Amendment right to a speedy trial, his COA application does not challenge the district court's conclusion that his Sixth Amendment right to a speedy trial was not

violated. Because he has not requested certification on that issue, it is also forfeited on appeal. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

Thus, the only claim properly before the Court is Herman's claim that his counsel was ineffective for failing to move to dismiss the indictment based on a Speedy Trial Act violation. As this Court has previously noted:

> [t]he Speedy Trial Act, 18 U.S.C. §§ 3161-74 (1982) requires that the accused be brought to trial within 70 days from the filing of the information or indictment, or from the date he first appears before a judicial officer of the court in which the charge against him is pending, whichever date last occurs.

United States v. Mentz, 840 F.2d 315, 325 (6th Cir. 1988) (footnote omitted) (citing 18 U.S.C. § 3161(c)(1)). "The harshness of this strict deadline is mitigated by section 3161(h), which excludes certain periods from the 70-day calculation." *Id.*

The district court concluded that Herman entered his guilty plea thirteen days (absent any excludable delays) after the Speedy Trial Act's seventy-day time limit expired. The court further concluded that Herman could not show prejudice as the result of counsel's failure to raise the issue because he could not demonstrate that the court would have ordered dismissal of the charges against him *with* prejudice under the applicable factors set forth by the Speedy Trial Act. *See* 18 U.S.C. § 3162(a)(2). In particular, the court explained that the charges were very serious and involved Herman's six-year-old daughter as a victim; the circumstances of the delay were not caused by bad faith, prosecutorial neglect, or intentional dilatory conduct and, in fact, no delays were caused by the government; and Herman made did not argue how he was prejudiced by the thirteen-day delay. Because the statutory factors of the Speedy Trial Act "strongly" supported a finding that the case would have been dismissed *without* prejudice, the district court concluded that Herman could not show prejudice under *Strickland* to establish the ineffective assistance of counsel.

In his COA application, Herman argues only that the district court's analysis of prejudice was erroneous and that the court should not have simply relied on the fact that the charges would have been dismissed without prejudice. He claims that the district court should have considered the fact that he would not have entered the plea agreement if he had known a "line of defense"

existed where the indictment would be dismissed on speedy trial grounds. Accordingly, he asserts that he suffered prejudice.

Reasonable jurists would not debate the district court's conclusion as to prejudice. First, Herman did not argue before the district court that he would not have entered the plea agreement if he had known the charges against him would be dismissed for a Speedy Trial Act violation. Instead, he presents this argument for the first time on appeal, which generally precludes consideration by this court. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006).

Second, this court has made clear that the prejudice to be demonstrated when counsel fails to bring a Speedy Trial Act violation to the attention of the court is that the charges would have been dismissed *with prejudice*. *Sylvester v. United States*, 868 F.3d 503, 511 (6th Cir. 2017). In *Sylvester*, this court explained that "[w]here the defendant 'has not demonstrated that, but for his trial [] attorney[']s[] unprofessional errors, the district court . . . would have ordered dismissal of the prosecution with prejudice based on a Speedy Trial Act violation,' he has not shown that counsel[']s[] deficient performance 'chang[ed] the result of the proceeding.'" *Id.* (quoting *McAuliffe v. United States*, 514 F. App'x 542, 546 (6th Cir. 2013)).

Herman has not challenged the district court's conclusion that a weighing of the factors under the Speedy Trial Act supported a finding that the charges against him would have been dismissed *without* prejudice. Absent that showing, he cannot demonstrate that he was prejudiced by counsel's failure to move for dismissal on Speedy Trial Act grounds. Because Herman has not made a substantial showing of the ineffective assistance of counsel, his claim does not deserve encouragement to proceed further.

For the foregoing reasons, Herman's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk