IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10700-H

CAMERON DEAN BATES,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

To merit a certificate of appealability, an appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Cameron Bates's motion for a certificate of appealability is DENIED because he failed to make the requisite showing. His motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Britt C. Grant
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 2:17-cv-14364-KMM

CAMERON DEAN BATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ON REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Petitioner Cameron Dean Bates' Amended Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. ("Mot.") (ECF No. 26). The Court referred the matter to the Honorable Lauren Louis, United States Magistrate Judge, who issued a Report and Recommendation recommending that the Motion be DENIED. ("R&R") (ECF No. 47). Petitioner filed objections. ("Objs.") (ECF No. 52). The matter is now ripe for review. As set forth below, the Court ADOPTS the R&R.[1]

[1] The Court adopts Magistrate Judge Louis' R&R with the following alterations: on page one, line twenty-three, the sentence should read, in part, "§§ 2252(a)(2) and (b)(1)"; on page seven, line eighteen, the citation should read "(*id.* at 74-75)"; on page sixteen, line one, the citation should read "*Id.* at 1235 n.20 (citing *Murray v. Carrier*, 477 U.S. 478, 492 (1986)); on page seventeen, line 10, the citation should read "*Kennedy*, 456 U.S. at 676 n.6"; on page eighteen, line fifteen, the citation should read "(ECF No. 26 at 22–23)"; on page twenty, line seventeen, the citation should read "*Strickland v. Washington*, 466 U.S. 668, 687 (1984)"; on page twenty, lines nineteen and twenty, the quoted language should read "*Strickland* places the burden on the defendant, not the state, to show a 'reasonable probability' that the result would have been different."; on page twenty, line twenty-four, the citation should read "*Strickland*, 466 U.S. at 690."; on page twenty-six, line twelve, the citation should read "(CRDE 404 at 118:22-24)"; on page thirty-three, line one, the citation should read "(CRDE 409 at 219)"; and on page thirty-four, line seven, the sentence should read, in part, "Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 72".

I. LEGAL STANDARD

The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The Court "must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). A *de novo* review is therefore required if a party files "a proper, specific objection" to a factual finding contained in the report. *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006). "It is critical that the objection be sufficiently specific and not a general objection to the report" to warrant *de novo* review. *Id.*

II. BACKGROUND

On August 23, 2012, Petitioner was charged in a two-count indictment with (i) receiving, between the dates of February 11, 2011 and June 19, 2012, images depicting child pornography, in violation of 18 U.S.C. § 2252(a)(2) and (b)(1); and (ii) distributing images depicting child pornography on June 1, 2012, in violation of § 2252(a)(2) and (b)(1). Indictment at 1–2, *United States v. Bates*, Case No. 2:12-cr-14054-KMM-1, ECF No. 28 (S.D. Fla. Jan. 5, 2017) ("CR ECF"). On February 14, 2013, a Grand Jury returned a superseding eighteen-count indictment, charging Petitioner with eight (8) counts of receiving child pornography, eight (8) counts of accessing and attempting to access files of child pornography, one (1) count of distributing child pornography, and one (1) count of possessing a computer that contained child pornography. (CR ECF No. 197). A jury convicted Petitioner on all (18) eighteen counts and, on June 3, 2013, Petitioner was sentenced to a 240-month term of imprisonment followed by fifteen (15) years of supervised release. (CR ECF No. 309). Petitioner appealed the conviction and the United States Court of Appeals for the Eleventh Circuit vacated the conviction and remanded, finding error in the *voir dire*. *United States v. Bates*, 590 F. App'x 882, 890 (11th Cir. 2014).

On remand, Respondent sought a second superseding indictment from the Grand Jury, which returned a six-count indictment, charging Petitioner with four (4) counts of knowingly receiving images depicting child pornography, one (1) count of distributing child pornography, and one (1) count of knowingly possessing a computer that contained child pornography. (CR ECF No. 349). A jury convicted Petitioner on all six (6) counts and, on September 15, 2015, Petitioner was sentenced to a 240-month term of imprisonment followed by fifteen (15) years of supervised release. (CR ECF Nos. 385, 394, 395). Petitioner appealed the conviction, arguing that (1) the Court erred when it admitted certain documents that contained inadmissible hearsay and (2) the prosecutor's references to Petitioner as a "big fish" during trial substantially prejudiced Petitioner's right to a fair trial. *United States v. Bates*, 665 F. App'x 810, 812 (11th Cir. 2016). Although the Eleventh Circuit agreed with Petitioner as to these arguments, the Eleventh Circuit affirmed the conviction because the errors were harmless in light of the "substantial untainted evidence against [Petitioner]." *Id.*

Now, Petitioner moves to vacate his conviction and dismiss the indictment, or alternatively, for a new trial or a reduction in his sentence. *See* Mot. at 13. Petitioner argues that (1) his retrial violated the double-jeopardy clause because the first conviction was obtained through Respondent's misconduct; (2) Respondent breached its constitutional duty to ensure that Petitioner received a fair trial by engaging in misconduct; (3) his trial counsel was ineffective; (4) the conditions of his pretrial confinement violated his Sixth Amendment rights; and (5) the Court improperly applied a two-level enhancement to his advisory sentencing guidelines. Mot. 14–33.

III. DISCUSSION

As set forth in the R&R, Magistrate Judge Louis finds that Petitioner's claims are without merit. As an initial matter, Magistrate Judge Louis finds that Petitioner's claims (1), (2), (4), and

(5) are procedurally barred because Petitioner failed to raise these claims on direct appeal of his conviction and none of the relevant exceptions to this requirement apply. *Id.* at 14–16.

Nonetheless, Magistrate Judge Louis also finds that all of Petitioner's claims fail on the merits. *See* R&R at 16–33. First, Magistrate Judge Louis finds that claim (1) lacks merit because the double-jeopardy clause does not preclude retrying a defendant whose conviction was set aside due to trial error as long as the conviction was not set aside due to the insufficiency of the evidence. *Id.* at 16–18. Second, Magistrate Judge Louis finds that claim (2) is without merit because the Eleventh Circuit already considered whether the admission of documents containing inadmissible hearsay and reference to Petitioner as a "big fish" and the "worst offender" at trial constituted error and held that any error was harmless. *Id.* at 18. Third, Magistrate Judge Louis finds that claim (3), which raises various sub-claims related to the effectiveness of Petitioner's second trial counsel, fails because the sub-claims lack sufficient factual support and are contradicted by the record, his counsel was not ineffective for failing to raise meritless arguments, and it was reasonable for Petitioner's second trial counsel to call the witnesses that he did at trial. *Id.* at 20–32. Fourth, Magistrate Judge Louis finds that claim (4) fails because the law does not support that Petitioner's conditions of confinement constitute a Sixth Amendment violation. *Id.* at 18–19. Fifth, Magistrate Judge Louis finds that claim (5) fails because it is contradicted by the record and the Court's two-level enhancement applied at sentencing was supported by the law and facts. *Id.* at 32–33. Accordingly, Magistrate Judge Louis recommends that the Motion be denied. This Court agrees.

In the Objections,[2] Petitioner argues that (1) his claims are not procedurally barred because the operative facts were not available before his direct appeal; (2) Magistrate Judge Louis

[2] Magistrate Judge Louis issued the R&R on January 2, 2020. *See generally* R&R. Therefore, the deadline to file objections to the R&R was January 16, 2020. *See* Fed. R. Civ. P. 72(b)(2) ("Within 14 days after being served with a copy of the recommended disposition, a party may

incorrectly presumes that his second trial counsel "did what he should have done"; (3) the Court ordered Petitioner to reduce the amount of detail in his Motion, which he complied with, and therefore it "vaporizes due process" for the Court to now deny Petitioner's Motion for not containing enough detail; (4) Magistrate Judge Louis applies the incorrect standard to Petitioner's ineffective assistance of counsel claim; and (5) he is entitled to an evidentiary hearing before proving his claims.[3] *See generally* Objs.

First, Petitioner argues that Magistrate Judge Louis erred in finding that claims (1), (2), (4) and (5) are procedurally barred because the relevant facts were not available before his direct appeal. *Id.* at 8–9. Specifically, Petitioner argues that the facts related to Respondent concealing that Christopher Davis testified before the Grand Jury, Respondent tampering with the laptop that contained child pornography, and other people using the laptop at issue were not available before

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serve and file specific written objections to the proposed findings and recommendations."). "Under the 'prison mailbox rule,' a *pro se* prisoner's court filing is deemed file on the date it is delivered to prison authorities for mailing." *Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009). The Court assumes "[a]bsent evidence to the contrary . . . that a prisoner delivered a filing to prison authorities on the date that he signed it." *Daniels v. United States*, 809 F.3d 588, 589 (11th Cir. 2015). Petitioner signed his Objections on January 22, 2020 and therefore his Objections are untimely. Nonetheless, in light of the likely delay in mailing the Objections and Petitioner's Motion for Extension of Time to File Objections (ECF No. 50), which the Court denied, the Court considers Petitioner's Objections.

[3] Petitioner also argues in the Objections that (1) his trial violated the double-jeopardy clause; (2) his counsel was ineffective for failing to retain the defense expert Petitioner utilized during his first trial; (3) his counsel was ineffective for failing to raise the double jeopardy issue; (4) his counsel was ineffective for failing to identify all other users of the laptop at issue and call them as witnesses; and (5) the Court improperly applied a two-level enhancement to his advisory sentencing guidelines because his offenses involved distribution. *See* Objs. 7–8, 10–11. However, these objections rehash the arguments Petitioner advanced in the Motion, which Magistrate Judge Louis considered and rejected, and therefore they are not proper objections. *See Marlite, Inc. v. Eckenrod*, No. 10-23641-CIV, 2012 WL 3614212, at *2 (S.D. Fla. Aug. 21, 2012) (noting that "[i]t is improper for an objecting party to" file objections to a report and recommendation "which are nothing more than a rehashing of the same arguments and positions taken in the original papers submitted to the Magistrate Judge" because "parties are not to be afforded a second bite at the apple when they file objections to [an] R & R") (citation and internal quotation marks omitted).

his direct appeal. *Id.* "Generally speaking, an available challenge to a criminal conviction or sentence must be advanced on direct appeal or else it will be considered procedurally barred in a § 2255 proceeding." *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994) (citing *Greene v. United States*, 880 F.2d 1299, 1305 (11th Cir. 1989), *cert. denied*, 494 U.S. 1018 (1990)). "A ground of error is usually 'available' on direct appeal when its merits can be reviewed without further factual development." *Id.* (citation omitted). Here, at Petitioner's second trial, Petitioner's trial counsel questioned Sergeant Valentine regarding Christopher Davis testifying before the Grand Jury. *See, e.g.*, (CR ECF No. 408) 235:16–18 ("Q. Well, you were aware that [Christopher Davis] testified in front of the Grand Jury, weren't you? A. Yes."). Further, at Petitioner's second trial, Petitioner's expert testified that Respondent's expert mishandled the laptop, (CR ECF No. 404) 130:3–18, and several individuals testified that others had access to the laptop, *id.* 167:19–25, 175:7–11, 192:6–13. Therefore, upon a *de novo* review, the Court finds that these facts were known to Petitioner before his direct appeal, and thus claims (1), (2), (4), and (5) are procedurally barred as set forth in the R&R.

Second, Petitioner argues that Magistrate Judge Louis improperly presumes that Petitioner's counsel's performance was proper when analyzing Petitioner's ineffective assistance of counsel claims. Objs. at 9. Specifically, Petitioner argues that *Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000), which states that "where the record is incomplete or unclear about [counsel]'s actions, [the court] will presume that he did what he should have done, and that he exercised reasonable professional judgment," only applies after a movant has been provided an opportunity develop the factual record such as through discovery or an evidentiary hearing. *Id.* (alterations in original). However, *Chandler* does not require that a Court hold an evidentiary hearing for this presumption to apply. *See, e.g.*, *Martin v. United States*, 703 F. App'x 866, 872–

73 (11th Cir. 2017) (applying the "strong presumption that counsel's performance falls within the 'wide range' of reasonable professional competence" and affirming district court's denial of evidentiary hearing). Therefore, Magistrate Judge Louis properly applied the presumption that Petitioner's counsel performed reasonably.

Third, Petitioner argues that the Court ordered Petitioner to reduce the amount of detail in his Motion but now Magistrate Judge Louis paradoxically recommends dismissing the Motion because it contains insufficient detail. Objs. at 9–10. However, this argument is not "a proper, specific objection" to a factual finding contained in the R&R, as it does not challenge Magistrate Judge Louis' finding that his Motion lacks sufficient supporting facts. Rather, Petitioner challenges the local rule imposing a page limit on his Motion as a due process violation, which is not a proper objection to the R&R. *See Macort*, 208 F. App'x at 784.

Fourth, Petitioner argues that Magistrate Judge Louis applies an incorrect standard to Petitioner's ineffective assistance of counsel claim, arguing that prior to an evidentiary hearing, Petitioner "need only allege—not prove—reasonably specific non-conclusory facts" supporting the claim. Objs. at 6. However, irrespective of whether an evidentiary hearing is held, to succeed on an ineffective assistance of counsel claim, "the defendant must show that counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Further, to show prejudice, "the defendant must show 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. In the R&R, Magistrate Judge Louis applies this standard and therefore Petitioner's objection is meritless. *See* R&R at 20.

Fifth, Petitioner argues that he is entitled to an evidentiary hearing before proving his claims. R&R at 6. However, the Court is not required to hold an evidentiary hearing on

Petitioner's claims before deciding the Motion because, as Magistrate Judge Louis finds in the R&R, Petitioner fails to adequately support his claims. *See Winthrop-Redin v. United States*, 767 F.3d 1210, 1212, 1220 (affirming the "district court's rejection of the [§ 2255] claims without an evidentiary hearing" because the petitioner did not provide sufficient support for his claims); R&R at 33. Thus, Petitioner's objection is without merit.

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the R&R, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Magistrate Judge Louis' Report and Recommendation (ECF No. 47) is ADOPTED and Petitioner's Amended Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (ECF No. 26) is DENIED. The Clerk of the Court is instructed to CLOSE this case. All pending motions, if any, are DENIED AS MOOT. The Clerk of Court is hereby directed to send the record, as supplemented by this Order, to the United States Court of Appeals for the Eleventh Circuit.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of February, 2020.

K. MICHAEL MOORE
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-CV-14364-MOORE/LOUIS
(2:12-CR-14054-KMM)

CAMERON DEAN BATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION

This matter is before the Court on Petitioner Cameron Dean Bates' Amended Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (ECF No. 26). This matter is referred to the undersigned for Report and Recommendation on any dispositive matter (ECF No. 3, 45). The government filed a response (ECF No. 28) to which Petitioner filed a reply (ECF No. 32). After careful review of the record and the arguments presented, the undersigned recommends that the Motion be **DENIED**.

I. BACKGROUND

a. The Indictments

Petitioner Bates was originally indicted in August 2012 in a two-count indictment that charged him with receiving, between the dates of February 2011 and June 19, 2012, images depicting child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1) (Count 1); and with distributing images depicting child pornography on June 1, 2012, in violation of 18 U.S.C. §§ 2252(a)(1) and (b)(1). In February 2013, a Grand Jury returned a superseding indictment charging Bates on eighteen counts: eight counts with receiving child pornography; eight counts

with accessing and attempting to access files of child pornography; one count of distributing child pornography; and one count of possessing a computer that contained child pornography. Petitioner pleaded not guilty to the superseding indictment and began a jury trial on February 26, 2013 ("*Bates I*"). Bates was convicted on all counts on March 8, 2013.

Bates was sentenced on June 3, 2013, to a term of 240 months followed by 15 years of supervised release (CRDE 309). Bates appealed the conviction and the Eleventh Circuit reversed, finding error in the voir dire process, and further finding that the government had not met its burden to show that the error was harmless. *United States v. Bates*, 590 F. App'x 882, 890 (11th Cir. 2014). Though the Court of Appeals reversed on this ground alone, the mandate noted that the government's last-minute change in strategy, including return of an 18-count superseding indictment and disclosure of new expert report within weeks of trial, may not have afforded Bates adequate time to prepare for trial. The Court of Appeals remanded with the expectation that Bates be afforded adequate time to prepare and obtain expert assistance "[i]f Mr. Bates is retried on remand." *Id.*

On remand, after retrial had been scheduled, the government sought a Second Superseding Indictment from the Grand Jury. The Grand Jury heard testimony from witnesses who testified that they had used the computer alleged in the indictment; one such witness was C. Davis, a friend of Bates' son, who testified that he used the computer, as did his girlfriend.[1] The Grand Jury returned a true bill on all six counts: Counts 1-4 allege that Bates knowingly received images depicting child pornography on specific dates named in each count; Count 5 alleged that Bates distributed an image of child pornography on June 1, 2012; and Count 6 alleged that Bates

[1] The Grand Jury proceedings are not in the record. The facts pertaining to the presentment to the Grand Jury are summarized as alleged by Bates; the government's Answer does not dispute his characterization, and defense counsel's line of questioning of the case agent at trial corroborates Bates' account of the Grand Jury witness presentment.

knowingly possessed a computer which contained child pornography.

b. The Trials

i. The First Trial ("*Bates I*")

Petitioner Bates was represented in the first trial by privately-retained counsel, Anthony Scremin. Scremin's relationship with Bates preceded his representation in the criminal case; he was a partner in the law firm that employed Bates as a paralegal for two years before Bates was indicted. *See* ECF No. 10 at ¶ 4. Scremin filed a number of pretrial motions challenging the government's case against Bates, including moving to dismiss the criminal complaint (CRDE 22); to dismiss the indictment, for prosecutorial misconduct and grand juror biases (CRDE 40, 49, 52); for a bill of particulars (CRDE 38); and to suppress Bates' statements to law enforcement (CRDE 43).

Despite retaining private counsel, Bates asserted indigency and filed a motion to proceed *in forma pauperis* in October 2012 for the purpose of requesting payment for an expert (CRDE 62). The Court granted his motion to authorize payment of an expert retained to forensically analyze the computer (CRDE 71) and ultimately approved payment to Petitioner's expert, Carter Conrad (CRDE 175).

The government's investigation began in 2011, when Detective Robert Valentine of the St. Lucie County Sheriff's Office identified several internet protocol (IP) addresses that were being used to access child pornography. Petitioner Bates was associated with each of the IP addresses associated with the child pornography downloads, at multiple physical addresses. At one point in the investigation, upon receiving notification of a download of child pornography occurring at one of these IP addresses, Det. Valentine traveled to the address connected to that IP address which he had identified as Bates' home. Before reaching the house, Det. Valentine saw Bates driving away from the house.

Det. Valentine sought and obtained a warrant to search the Bates residence. Multiple computers were found inside of the residence, and one was found outside in Bates' locked car. The only computer found to have child pornography on it was the one found in Bates' car. Forensic analysis showed that the temporal proximity of the download of certain images of child pornography was close in time to other documents made and accessed by Bates, including documents generated for his work as a paralegal and downloads of music. The computer also had evidence of Bates' personal and intimate life, including images of Bates nude, engaged in sexual conduct with men, and evidence of a "Craigslist".[2] advertisement placed by Bates for sexually oriented relationships with men. The evidence of Bates' extra-marital and homosexual activities was offered by the government, and admitted over objection, to prove that the computer was used by Bates, as opposed to the other members of his household, as his extra-marital sexual conduct had been kept secret from his family.

The theory of defense advanced that other people used the laptop and that the government had failed to prove that Bates knowingly received or viewed the child pornography. Bates himself testified over two days and specifically denied ever downloading or viewing any of the illicit images (CRDE 287 at 1523-24). Bates provided an alibi for himself for each of the dates on which it was alleged in the indictment that illicit images had been downloaded. Additionally, he denied that he was home on the date on which Det. Valentine testified that he observed Bates leaving the house after receiving an alert that a download of child pornography had occurred at Bates' address (*Id.* at 1465, 1507).[3] Bates called family members who testified that Bates allowed others to use the computer, including his son's friend C. Davis, who Bates argued to the jury was the likely

[2] Craigslist is an American classified advertisements website with sections devoted to jobs, housing, dating, and other topics.

[3] The government moved for a two-level enhancement in Petitioner's sentencing guideline range, pursuant to USSG § 3C1.1, for Bates' willful attempt to obstruct justice by offering false testimony. The Court granted the motion over Petitioner's objection.

culprit of the crime.

ii. *Bates I* Appeal

Bates appealed his conviction on several grounds: that the Court had abused its discretion in denying the defense motion to continue; that the Court erred in allowing the government to introduce evidence of Bates' sexual preferences; and that the Court erred in jury selection by not permitting *voir dire* into biases about sexual preference and homosexuality. The Eleventh Circuit reversed, with a divided panel,[4] on the sole issue of jury selection, agreeing that the Court should have examined the jurors to determine the extent to which any had prejudices against homosexuality that would cause them to not be impartial. *United States v. Bates*, 590 F. App'x 882, 884 (11th Cir. 2014). The appellate court held that Bates' defense—that he did not exercise sole control over the computer—meant that the "facts about his sexual activities were inextricably bound up with a central element of the charges against him." *Bates*, 590 F. App'x at 887. The appellate court reversed the conviction without reaching Bates' other grounds for appeal, though specified that "on remand," Bates be afforded sufficient time and resources to prepare a defense at retrial. *Id.* at 891.

c. Retrial ("*Bates II*")

i. Trial and Pretrial Motions

Following remand, Bates' retained counsel moved to withdraw, representing that he had been retained only for the first trial and had not been appropriately paid for that representation (CRDE 334). The Court granted the motion and appointed Assistant Federal Public Defender Fletcher Peacock. Upon appointment, counsel moved for entry of a bond for Bates, who had been remanded following his conviction in the first trial (CRDE 347). The motion was denied by the

[4] The dissenting judge would have affirmed on the basis that any error in the *voir dire* process was harmless, as the evidence of guilt was "overwhelming." *Id.* at 893.

Magistrate Judge, and counsel appealed the denial to the district court, arguing that Bates had no incentive to flee but rather anticipated his retrial would result in acquittal, absent the "objectionable material" evidence of his homosexuality being introduced to an impartial jury (CRDE 360 at ¶ 4). The appeal further argued that as a defendant in custody, he was at a clear disadvantage, with access to counsel, discovery and his family all "extremely limited." The appeal specifically averred that "his mental and emotional well-being is affected by the harsh conditions of pretrial confinement" and that with Bates detained, "the government has been put in a better position due to its misconduct" (*Id.*). The appeal was denied, and Bates remained in custody through trial (CRDE 362).

Before trial, Bates' counsel filed two motions *in limine* to exclude and limit evidence from being presented to the jury. The first motion *in limine* related to the images of child pornography found on the computer named in the indictment; the motion offered to stipulate to the fact that the images were found on the computer and that they depicted images of minors engaged in sexually explicit conduct, arguing that the probative value of presenting the graphic images to the jury was substantially outweighed by the unfair prejudice to Bates (CRDE 367). Counsel also moved to exclude any evidence of Mr. Bates' homosexuality or alternative sexual lifestyle, including photographs and sexually-explicit Craigslist advertisements (CRDE 368). In the motion, counsel acknowledged the government's proffered need to admit the evidence to show that Bates would not have let others use the laptop computer for risk that his family would discover his alternative life style, which he had kept secret. Bates, through counsel, offered to stipulate that Bates placed the advertisement on Craigslist, and that he did so at the times allegedly in close temporal proximity to the downloads of child pornography; but argued that the sexually explicit content of the advertisement was immaterial and should be excluded. The Court denied both motions *in limine*; the Order relating to Bates' "Sexual Preferences and Lifestyle" noted that counsel would

be permitted to conduct *voir dire* on the question (CRDE 373).

Bates' retrial began on June 8, 2015, following a continuance at defense counsel's request (ECF Nos. 358, 359).[5] During jury selection, both defense counsel and prosecutor conducted *voir dire* on the question of homosexuality, asking potential jurors to identify any biases they held that may cause partiality in the case (CRDE 408 at 3-4; 36-37). Before opening statements began, defense counsel renewed his objection to the introduction of the evidence challenged in his motions *in limine*, seeking a standing objection to the evidence (*id.* at 73).

In opening statement, prosecutor Reggie Jones described the inception of the investigation that led to Bates' arrest and indictment:

> In March 2011, Sergeant Valentine[6] was conducting computer investigations to individuals involved in sharing and receiving child pornography in and around the St. Lucie County area and you'll hear testimony throughout this trial regarding the various tools and databases, various tools and databases in [sic] law enforcement used to conduct these computer investigations.
>
> So in March 2011, Sergeant Valentine was conducting investigations into the big fish, both individuals downloading and sharing the most child pornography in and around St. Lucie County.

(*id.* at 74-74). Counsel for Bates objected "to the characterization of big fish" (*id.* at 75). The Court agreed, stating "[t]his is not argument." (*Id.*). Det. Valentine, the case agent, again was the government's first witness and repeated the characterization; asked to explain the origin of his investigation into Bates, he testified "I identified an IP address that was what I considered a big fish." (*Id.* at 102). Counsel again objected, that objection was overruled by the Court. Det. Valentine thus continued:

> I want the big person, the person that's, that's possessing or distributing the most files. I'm not going to go after somebody that has a couple of files when I have

[5] Petitioner provided a hand-written waiver of his speedy trial rights in support of the motion to continue, averring that he had discussed the rights he was waiving with his counsel (ECF No. 358-1).

[6] Between *Bates I* and *Bates II* Detective Valentine was promoted to Sergeant. Throughout the second trial he was referred to as Sergeant Valentine, however for the sake of clarity the Court now refers to him as Detective Valentine, his rank at the time of the investigation.

> somebody that's trading fifty. It doesn't make sense. I want to go after the worst user which I consider the big fish and like with this case, I know I'm going to try to pick out three cases and try to work them all at the same time or around the same time just in case one case is in a different jurisdiction, I can go and forward it, I haven't wasted time waiting on subpoenaes to come back from the internet service provider, so I'll only pick like three IP addresses out, the worst offenders, and start working that case.

(*Id.* at 102-03). Det. Valentine then began discussing his investigation into Mr. Bates. He next testified regarding the ICACCOPS database[7] which revealed that certain IP addresses had downloaded files appearing to be child pornography in Port St. Lucie, Florida (*Id.* at 105-107). He was able to identify, through subpoenaes to AT&T, that the IP addresses belonged to a computer belonging to Bates. He also testified that he was able to identify child pornography downloads from, Samuel Gruen, who was identified as Petitioner's lover and employer. Det. Valentine testified that the downloads stopped in April of 2011 and he ceased his investigation. However, in 2012 the downloads began again from the same IP address and Det. Valentine testified that he began a new investigation. During this investigation Det. Valentine testified that he received hits of child pornography being downloaded at Petitioner's new house, Petitioner's paralegal business, Mr. Gruen's house, and the house of Mr. Gruen's neighbor, Marianne Jankowski (*Id.* at 151-53).

Valentine testified that he was able to obtain through the peer-to-peer software a partial direct download from Petitioner's computer on June 1, 2012.[8] He then confirmed that the video he downloaded from Petitioner's computer was in fact child pornography (CRDE 408 at 145-46). Det. Valentine testified that on June 18, 2012 he received an email alert that a download of child pornography was occurring at Petitioner's house (*Id.* at 159:11-21). After receiving the email of

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[7] Det. Valentine testified that ICACCOPS was an online database that law enforcement used to track individuals downloading child pornography (CRDE 408 at 98).

[8] Det. Valentine described peer-to-peer software during his direct examination stating:

> "[P]eer-to-peer software is a file and I'm sharing it and you want that file. It could be music, it could be any type of file that you have on your computer and I can type in search terms or key words looking for that file and if I have it and I'm sharing it, somebody else can grab that file from me and it's a direct, it's a direct connection from my, from my computer to that person's computer and vice versa." (CRDE 408 at 91:2-8).

the active download, Det. Valentine testified he got into his car and drove directly to the Petitioner's home. Before he could get to Petitioner's home he witnessed Bates driving away from his house (*Id.* at 160).

Det. Valentine applied for a search warrant to search Petitioner's home. During the search of Petitioner's home several computers were seized and securely previewed for child pornography. The only computer found containing child pornography was Petitioner's laptop. During the search, Det. Valentine testified that he interviewed Petitioner and that Petitioner admitted to having downloaded child pornography, claimed he deleted the files, but admitted to using the peer-to-peer software that Det. Valentine had been investigating (*Id.* at 191).

The prosecution also presented Sergeant John Parow, who was the computer examiner for the sheriff's department (CRDE 409 at 36). He testified that he received training on forensic computer examinations and that he was the officer who conducted the preview forensic computer examination of Petitioner's laptop during the search. He testified that he made a mirror image of the computer as it was seized from the house but then turned the computer on after the seizure which changed some of the internal BIOS stat on the computer, a decision he admitted was a mistake (*id.* at 56). However, he testified that the mistake did not affect the original mirror image (*id.*).

The prosecution called two witnesses associated with one of the IP addresses used to download images of child pornography to establish that neither had been the person who caused the downloads. First, Samuel Gruen testified that he met Petitioner through an online website and they began a sexual relationship. The relationship turned into a business relationship and Bates began doing work for Mr. Gruen. Mr. Gruen testified that Bates used the laptop at issue in his home. He also testified that he had never met Bates' wife or children and they had never been to his home and that he had never been to Bates' home. The prosecution similarly called Marianne

Jankowski, Mr. Gruen's neighbor, who confirmed that before she was approached by law enforcement in her home on June 29, 2012, her wireless network had not been protected by a password.

The prosecution finally called Special Agent Brian Ray, a cybercrimes investigator for the Department of Homeland Security. Special Agent Ray testified to the two reports he issued following his forensic examination of Petitioner's computer. He testified that he identified 110 child pornography files that he described in his report of Bates' laptop (*Id.* at 170:12-13). Special Agent Ray also testified that the settings of the peer-to-peer software that was installed on the hard drive had been changed so that different files went to different folders and that the rate at which someone could download from the subject computer had been slowed (*Id.* at 221). He also testified that several files containing images of Bates in sexual positions were found in the same folder as files containing child pornography.[9] Additionally, Special Agent Ray testified to all of the personal documents that Petitioner had on the computer including files and folders relating to his employment with Mr. Gruen and his paralegal business. Special Agent Ray also testified that he found emails between addresses known to be used by Bates sending messages of links to Craigslist ads between the two email addresses, as well as records of ads that had been viewed on Craigslist, and one ad that was placed by the computer at issue (*Id.* at 205). Special Agent Ray offered his opinion that Bates was the exclusive user of the computer (*Id.* at 239). Special Agent Ray then testified to the temporal proximity of child pornography relative to other files that he attributed to Bates. Special Agent Ray concluded his direct examination by stating that based on the totality of everything he saw, it was clear that Bates was downloading and viewing child pornography (CRDE

[9] Defense counsel renewed his objection to the introduction of the craigslist images. The prosecution argued that the pictures were highly relevant because they were posted on Craigslist at or about the same time a lot of activity was seen on the computer involving child pornography which would establish that Petitioner was the one behind the computer (*id.* at 143:13-19). The Court overruled the objection, finding the evidence probative in light of the defense theory and not unduly prejudicial in the context of the evidence overall (*Id.* at 146:3-11). The Court gave a limiting instruction before admitting the contested images (*Id.* at 206-207).

404 at 44:7-9).

After the government rested, the defense called its expert, Richard Connor. Mr. Connor is both an attorney and a computer forensic investigator. He testified that the review of the mirrored image did not conclusively demonstrate who had downloaded the child pornography. He also testified to finding recent sites visited including Zales.com and Disney.com.

The defense called multiple witnesses to testify about the common usage of the named computer by family members and others. Rosemary and Kelly Russell are the sister-in-law and brother-in-law of Petitioner, respectively. They both testified they saw numerous individuals use the laptop at issue, and they themselves had used the laptop at issue. Mrs. Russell additionally admitted that she had looked up Disney passes on the computer (CRDE 404 at 168:12-15).

The final witness called by the defense was Barbara McCourtney Bates, Petitioner's wife. Mrs. Bates began her testimony by detailing her relationship with her husband. She testified that Petitioner was a very busy person and worked multiple jobs during the times in question. She testified that she knew he worked for Mr. Gruen but did not know about his affair until she testified at the first trial. She also testified that she purchased the computer at issue with her husband and that she had used it previously (*Id.* at 189:16-19). Additionally, she testified that others beyond her family members had used the computer, including her son's friend, C. Davis (*Id.* at 190:13-20). Mrs. Bates also provided an alibi for Petitioner for certain dates on which child pornography was alleged to have been downloaded, indicating that her husband was with her on those days for most of the day. She provided receipts of the locations which she claimed to have visited to corroborate the alibi.

The jury returned a verdict of guilty as to all counts.

d. Sentencing

Bates was sentenced on September 15, 2015 (CRDE 394, 395). Prior to sentencing, a

Presentence Investigation Report ("PSI") was prepared by the U.S. Probation Office (CRDE 389), which calculated a guideline range of imprisonment of 210 to 262 months. Beginning with a base offense level of 22 pursuant to USSG § 2G2.2 for receiving, distributing or possessing child pornography, the PSI recommended a two-level enhancement because the offense involved minors under the age of 12; a two-level enhancement because the offense involved distribution; a four-level enhancement because the offense involved images depicting violence; a two-level enhancement because the offense involved use of a computer for the transmission or receipt of the material; and a five-level enhancement because the offense involved more than 600 images of child pornography. A total adjusted offense level of 37 resulted, with a criminal history category I, and a corresponding guideline range of 210 to 262 months.

Defense counsel filed a written objection to the application of the two-level enhancement for the distribution (CRDE 390). Section 2G2.2(b)(3) of the Sentencing Guidelines (2012) provides for an enhancement for an offense involving distribution of child pornography, up to seven levels if the distribution was to a minor and intended to entice that minor to engage in prohibited sexual conduct, and as low as two levels, if the distribution involved none of the other aggravating characteristics enumerated in the other subsections. USSG § 2G2.2(b)(3)(F). The guideline requires application of the greatest of the applicable enhancements for distribution.

At the sentencing hearing, defense counsel argued against application of the enhancement, arguing the absence of any evidence that Petitioner had actively or intentionally distributed material to other persons (CRDE 403 at 3-4). Addendum to the PSI noted counsel's objection and observed that the offense had involved peer-to-peer software, which allowed others to download from his computer, as Det. Valentine had testified he had done on June 1, 2012 (CRDE 392). The Court adopted the reasoning of the probation officer and denied the objection (CRDE 403 at 5). The Court also denied the motion for variance (CRDE 393) and imposed a sentence in the middle

of the calculated guideline range: 240 months as to counts 1 through 6, to run concurrently to each other.

e. The Direct Appeal

Bates appealed his conviction to the Eleventh Circuit, raising the following challenges: the Court erred in admitting certain documents containing inadmissible hearsay; and the prosecutor's improper comments, referring to Bates as a "big fish", substantially prejudiced his right to a fair trial. The Eleventh Circuit agreed that the challenged documents were admitted in error and that the government's remarks were improper but affirmed the conviction because the errors were harmless in light of the "substantial untainted evidence against him." *United States v. Bates*, 665 F. App'x 810, 812 (11th Cir. 2016).[10]

f. This 2255 Motion

Petitioner initiated the present action on October 18, 2017, within one year of the Eleventh Circuit's affirmance.[11] His initial Motion to Vacate exceeded 200 pages and raised 28 claims for relief. The Court required him to amend his petition and ordered that any amended petition must adhere to the Local Rules and Rules Governing Section 2255 Proceedings (ECF No. 4). The Court cautioned Petitioner that it would only consider claims raised in his amended motion, which would serve as the sole operative pleading. The Court additionally warned Petitioner that failure to allege sufficient factual support would subject his claims to dismissal, and that no further amendments would be permitted (*id.* at 6). Petitioner ultimately filed his Amended Motion on January 18, 2018 (ECF No. 26), to which the government responded on March 9, 2018 (ECF No. 28). Petitioner filed a Reply thereto (ECF No. 32), and the Motion is now fully ripe.

Bates' Petition moves to vacate his conviction and dismiss the indictment. Alternatively,

[10] The mandate was entered on January 5, 2017.
[11] The government acknowledges in its Answer that the Petition is timely.

Bates seeks a new trial, or reduction in his sentence. Bates raises five claims in his Petition. First, he contends that his retrial violated the double-jeopardy clause because the first conviction was obtained through government misconduct. Second, he claims the government breached its Constitutional duty to a fair trial by engaging in misconduct in the retrial. Third, he claims that his trial counsel was ineffective for four reasons. Fourth, Bates raises a Sixth Amendment challenge to the condition of his pretrial confinement, which he alleges prevented him from meaningfully conferring with his appointed counsel. Finally, Bates raises a challenge to the Court's application of a two-level enhancement to his advisory sentencing guidelines, which he contends counsel was ineffective for failing to argue at sentencing.

II. ANALYSIS

Pursuant to 28 U.S.C. § 2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. § 2255. If a court finds a claim under § 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.* To obtain this relief on collateral review, however, a habeas petitioner must "clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166(1982) (rejecting the plain error standard as not sufficiently deferential to a final judgment).

The government argues that Bates' claims for relief are procedurally barred from consideration in this § 2255 proceeding. A motion to vacate under § 2255 is not a substitute for a direct appeal, and issues which could have been raised on direct appeal are generally not actionable in a § 2255 motion and will be considered procedurally barred. *Massaro v. United States*, 538 U.S.

500(2003); *Lynn v. United States*, 365 F.3d 1225, 1234–35 (11th Cir. 2004). Accordingly, a non-constitutional error that may justify reversal on direct appeal does not generally support a collateral attack on a final judgment, unless the error (1) could not have been raised on direct appeal and (2) would, if condoned, result in a complete miscarriage of justice. *Lynn*, 365 F.3d at 1232–33 (quoting *Stone v. Powell*, 428 U.S. 465, 477 n.10 (1976)).

A defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding. In his Amended Petition, Bates acknowledges that none of the grounds raised were previously raised in any court—at trial or on appeal—explaining only that "[t]hey were overlooked by counsel or they were not ripe for review" (ECF No. 26 at 11). There is no dispute by the government that Bates' claims of counsel's deficient performance are not barred, as claims of ineffective assistance are generally not considered ripe until collateral attack. *See Massaro*, 538 U.S. at 504. For all other claims raised in this Petition, Bates' failure to raise them before this collateral attack procedurally bar this Court from considering them now, unless Bates can establish one of the two exceptions to the procedural default rule. *Lynn*, 365 F.3d at 1232–33.

Under the first exception, a defendant must show cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error. *Frady*, 456 U.S. 152, 168, (1982). Under the second exception, a court may allow a defendant to proceed with a § 2255 motion despite his failure to show cause for procedural default if "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Lynn*, 365 F.3d at 1234. The second narrow exception is inapplicable here because there is no evidence establishing that Bates is actually innocent. Therefore, unless Bates has shown cause and prejudice for not raising his § 2255 claims on direct appeal, the rule bars him from raising them herein.

To show cause, a defendant must show "some external impediment preventing counsel

from constructing or raising the claim." *Lynn*, 365 F.3d at 1235 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Bates has not shown that the facts on which he now relies were unavailable on direct appeal, but rather generally avers only that the facts were not made part of the record. This is insufficient to overcome the procedural bar.

Accordingly, Petitioner's first, second, fourth and fifth claims—all but his claims for ineffective assistance of counsel—are procedurally barred from review on this collateral attack. Notwithstanding, the undersigned has considered the merits of Petitioner's claims in the sections that follow and offer alternatively recommendation to deny the Petition on its merits.

a. First Claim of Government Misconduct: Double Jeopardy

Petitioner alleges that in the first trial, the government engaged in intentional misconduct, designed to "ensure a mistrial," for the purpose of disadvantaging the defense for a second trial. Petitioner alleges the government's misconduct was intended to deplete him of resources used in the first trial; obtain a preview of the defense evidence; and conduct a "dry run" of the government's evidence; all for the purpose of strategic advantage on retrial. Consequently, Bates argues, his retrial violated the Double Jeopardy Clause.

Bates did not raise this claim on either appeal, nor did he raise the double jeopardy challenge before his retrial. No cause is offered for this failure to raise the claim previously in any federal court, and the claim that his retrial violated the Double Jeopardy Clause is procedurally barred.

Nor does the record show any Constitutional error occurred. The Double Jeopardy Clause does not preclude retrying a defendant whose conviction is set aside because of a trial error. *Burks v. United States* 437 U.S. 1, 14 (1978). Only if the conviction is set aside because of the insufficiency of the evidence will the Double Jeopardy Clause limit the government's ability to retry a defendant. *See, e.g., United States v. DiFrancesco*, 449 U.S. 117, 130–131(1980). In his

Reply, Petitioner argues that the bad faith conduct by the prosecution barred retrial, citing *Oregon v. Kennedy* and *United States v. Dinitz*. 456 U.S. 667 (1982); 424 U.S. 600 (1976). In *Kennedy*, the Supreme Court clarified prior precedent, including *Dinitz*, holding that "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Kennedy*, 456 U.S. at 676. *Kennedy* is important here for two reasons. First, *Kennedy* expressly declined to expand the narrow exception to the rule that a defendant may be retried if he prevails on a motion for mistrial, observing the above-cited principle that if he does not succeed on the motion for mistrial but did successfully overturn his conviction on appeal, the government could of course try him a second time. *Kennedy*, 456 U.S. at 677, n.6. Second, the standard set by *Kennedy* requires a showing of intent by the judge or prosecutor to provoke the defendant into moving for a mistrial. *Id.* at 679.

Kennedy lends no support to Petitioner's Double Jeopardy claims. Petitioner never moved for a mistrial in the first trial, and his conviction was overturned not because of the insufficiency of the evidence but rather upon finding an error in the trial process. *See Bates*, 590 F. App'x at 884. The Eleventh Circuit specifically contemplated that the government might retry the case and gave specific instructions in its mandate to the Court. *Id.* at 890 ("[O]n remand the District Court must assure itself that Mr. Bates has adequate resources to permit his expert to review the evidence, and enough time to pursue the evidence necessary to aid in his defense.").

Nor, finally, does the Amended Motion or the record support Petitioner's conclusory allegations that the government harbored an intent to goad him into a mistrial for strategic advantage. Putting aside the inflammatory language Bates uses to describe the "shocking manner of [the government's] improper strategy," or the prejudice he contends he suffered by attrition of resources available to him on retrial, his first claim does not allege any facts on which a cognizable

claim could be based.

b. Second Claim of Government Misconduct: The Retrial

In his second claim, Petitioner alleges government misconduct in the second trial, beginning with those errors raised on appeal: that the government advanced documents containing inadmissible hearsay, and the prosecution made improper remarks by calling him a "big fish" and the "worst offender." These errors were raised on appeal, and the Court of Appeals has already considered both and determined that the errors, considered together or alone, were harmless. "[W]here there has been no intervening change in controlling law, a claim or issue that was decided against a defendant on direct appeal may not be the basis for relief in a § 2255 proceeding." *Rozier v. United States*, 701 F.3d 681, 684 (11th Cir. 2012).

Bates raises three additional alleged acts of misconduct: that the government concealed evidence that its case agent was infirm; the government concealed that a witness (C. Davis) had testified to the grand jury about his personal use of the computer named in indictment, as well as others' use of it; and that the sheriff's office forensic investigator tampered with the computer, rendering it unreliable and inadmissible (ECF No. 26 at 7-8). None of these issues were raised on appeal and Petitioner has not shown cause for not raising them; accordingly, he is procedurally barred from doing so for the first time in this collateral attack.

c. Fourth Claim: Government Precluded Bates from Having Effective Assistance of Counsel

On Reply, Bates raises a litany of complaints against the "government" for conditions of transport and confinement. Bates contends that the government "ensured" Bates' return to trial "truncated" his chances of producing exculpatory evidence, "by stalling" him along the way in "slave-galley conditions," the government effectively prevented counsel from accessing primary source of facts- Bates himself. Bates alleges that the conditions of confinement depleted his health rendering him an "ineffective assistant" for his counsel. He also alleges that he was placed in

communication-restricted confinement and avers he was unable, as a result, to explain to his appointed counsel the value of certain evidence, such as a charge log used to show account activity. Bates' failure to raise these issues previously renders them procedurally barred unless he can demonstrate both cause for counsel's failure to raise it and prejudice.

Though Bates offers that "none of these events appear in the trial record," the record shows otherwise. As noted above, counsel's appeal of the Magistrate Judge's denial of a bond recites the complaints Bates now raises in this collateral attack—that he was disadvantaged by being held in custody, with limited access to counsel and his family—though none of Bates' allegations of intentional misconduct was then raised. Nor did Bates or counsel raise to the trial or appellate court that the limited access had interfered with the counsel's ability to prepare for trial. Bates cannot raise this error for the first time on collateral attack, thus the Court is barred from considering it anew.

Nor does the law support Petitioner's claim of misconduct in this respect. Petitioner claims that he was subjected to "diesel therapy," that is, that he was purposefully moved around in a circuitous route in order to delay his ability to communicate with his attorney and supply facts to defend himself. He cites to *United States v. Durfey* in support. No. 5:06-CR-193 MCR, 2010 WL 4342107, at *11 (N.D. Fla. Sept. 20, 2010), *report and recommendation adopted*, No. 5:06CR193 MCR, 2010 WL 4282083 (N.D. Fla. Oct. 21, 2010). Notably, the court in *Durfey* rejected a collateral attack that raised, as a basis for ineffective assistance, counsel's failure to protect the defendant from the alleged "diesel therapy" like that about which Petitioner now complains. It lends no support to Petitioner's claims in this respect. Nor does *Chavez v. Cockrell*, to which Petitioner cites to support his contention that his unkept appearance and discourteous treatment by the Marshal's deputies denied him the presumption of innocence before the jury. 310 F.3d 805 (5th Cir. 2002). Notably, the court rejected this claim in *Chavez*, denying the certificate of

appealability to a defendant who was stunned accidentally by court security officers during his murder trial.

d. Ineffective assistance

Petitioner raises a series of bases that predicate his claim that he was denied the effective assistance of counsel. Petitioner complains that counsel should have taken more time, requested a larger budget, and drawn more from the resources of his first trial: his first attorney, Anthony Scremin, and the expert retained by Mr. Scremin. The petition delineates four sub-claims of ineffective assistance: (1) that Mr. Peacock went to trial under-prepared and failed to object to the government's continued misbehavior; (2) that Mr. Peacock failed to retain the defense expert utilized during *Bates I* by the defense and that this failure is objectively deficient; (3) that Mr. Peacock overlooked "the double jeopardy issue;" and (4) that Mr. Peacock should have identified all other users of the laptop computer at issue and called them as witnesses.

The Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his Defense." U.S. Const. amend. VI. To prevail on a habeas corpus petition based on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 669 (1984). Courts review counsel's performance in a highly deferential manner under a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. For the second prong "*Strickland* places the burden on the defendant to show a 'reasonable probability' that the result would have been different." *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (quoting *Strickland*, 466 U.S. at 694).

A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Id.* at 690. A convicted defendant making such a claim must identify the acts or omissions

of counsel that are alleged not to have been the result of reasonable professional judgment. *Id.* To determine whether counsel's performance was deficient, the court must, with much deference, consider whether counsel's assistance was reasonable considering all the circumstances. *Srtickland*, 466 U.S. at 688. Moreover, the court must avoid the "distorting effects of hindsight" and assess the reasonableness of counsel's performance from his perspective at the time of the challenged conduct. *Id.* at 689. In this regard, "strategic choices" made by counsel after thoroughly investigating the relevant law and facts are "virtually unchallengeable." *Id.* at 690. "Where the record is incomplete or unclear about counsel's actions," the court "will presume that he did what he should have done, and that he exercised reasonable professional judgment." *Chandler v. United States*, 218 F.3d at 1314 n.15 (internal quotation marks and alteration omitted).

Regarding the prejudice requirement, the Supreme Court observed that an unreasonable error by counsel does not justify setting aside a criminal judgment when the "error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Thus, absent special circumstances, the defendant must affirmatively prove prejudice resulting from his counsel's deficient performance. *Id.* 692-93. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Establishing Strickland's deficient-performance and prejudice elements "is not easy: 'the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between.'" *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1322 (11th Cir. 2002) (per curiam) (quoting *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc)). If a petitioner makes an insufficient showing on either element, the court need not address the other element. *See Strickland*, 466 U.S. at 697. With these standards in mind, the Court turns to the merits of Bate's four ineffective-assistance claims.

1. Counsel was Under Prepared and Failed to Object

Petitioner's first sub-claim is that Counsel failed to object to the "government's continued misbehavior" (ECF No. 26 at 10). The misconduct about which he complains is the government's introduction of evidence of his "homosexual lifestyle as a precursor of perversion" (*Id.*). Petitioner also raises in his first sub-claim that his counsel "bemoaned being overworked generally," lacked time and resources to obtain quality resources or interview witnesses, and consequently fell below the standards of professional conduct and denied him a fair trial (*id.*). Respondent averred in its response that counsel did in fact object to the introduction of the Petitioner's homosexual lifestyle and that even if Mr. Peacock was overworked, Petitioner fails to allege any specific errors by Mr. Peacock that prejudiced him under the *Strickland* standard.

Petitioner's claim that Mr. Peacock was underprepared alleges in conclusory fashion that his trial counsel was ineffective, focusing his argument on proving *why* counsel was ineffective, but not *how*. For example, Petitioner alleges that his appointed counsel lacked the time or resources to identify and interview witnesses, including alibi witnesses without identifying those witnesses counsel should have interviewed (ECF No. 32 at 3).[12] Bates must allege facts that, if true, would substantiate Bates' assertions that his counsel's representation failed the *Strickland* standard, by specifically identifying the allegedly ineffective actions *and* corresponding prejudice flowing therefrom. By simply identifying the possible *reasons* for counsel's alleged underperformance (that he was too busy), Bates cannot fill the gap between alleged misconduct and any prejudiced suffered as a result.

To the extent this claim faults counsel for failing to object to the government's introduction of evidence of Petitioner's homosexual lifestyle, the record conclusively shows otherwise. Before

[12] Petitioner names two alibi witnesses in his Petition but explains they had died before the second trial(ECF No. 26 at 5). Counsel cannot be ineffective for failing to interview dead witnesses.

trial, Mr. Peacock moved *in limine* to preclude the government from introducing evidence of Bates' sexual preferences and homosexuality, including evidence of a Craigslist advertisement placed in close temporal proximity to the illegal download activity. In support of his motion *in limine*, Petitioner offered to stipulate to the fact that he placed the advertisement, without revealing the content of the advertisement, arguing that the need to reveal the content of the advertisement was heavily outweighed by the potential prejudice to Petitioner (CRDE 368). Continuing throughout trial, Counsel objected to the introduction of any such evidence, despite the Court recognizing a standing objection (CRDE 408 at 73). Further, counsel attempted to keep out photos of the Defendant engaged in homosexual acts in a sidebar with the Court at trial (CRDE 409 at 142–44). Having failed to allege facts that support a finding of deficiency in counsel's performance in this respect, the Court need not consider prejudice. *Strickland*, 466 U.S. at 697.

Even still, the admission of the evidence was not so prejudicial such that counsel's failure to exclude it was deficient. Pursuant to Federal Rule of Evidence 403 the Court may exclude relevant evidence if its probative value is substantially outweighed by its prejudicial effect. At trial, the prosecution argued that the admission of the photos of Petitioner were necessary to show his use of the computer, but more importantly, his exclusive use of the computer. The prosecution averred at trial that because Petitioner's homosexuality was kept secret from his friends and family, he would not have allowed unfettered access to a computer which would have revealed his most closely held secrets (CRDE 404 at 267–68). During the trial, the Court found that the prejudicial effect was not so substantial as to outweigh the probative value. Because the evidence was not so prejudicial as to outweigh the probative value, Mr. Peacock's failure to have it excluded was not deficient. *See Lamontagne v. Sec'y, Dep't of Corr.*, 433 F. App'x 746, 749 (11th Cir. 2011) (holding that a defendant's faulty assumption that properly excluded evidence should not have been excluded does not give rise to deficient performance under *Strickland*).

In his Reply, Petitioner claims that Mr. Peacock was deficient because he failed to speak with and use the assistance of Anthony Scremin, Petitioner's first trial counsel. [13] In support of his claim he presented the affidavit of Mr. Scremin (ECF No. 10). To the extent that Petitioner avers that Mr. Peacock should have called Mr. Scremin as a witness, which witness to call is purely a strategic choice. *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995). Even so, Petitioner fails to explain what prejudice, if any, he suffered from Mr. Peacock's failure to consult Mr. Scremin as Petitioner has not stated what Mr. Scremin would have testified to that was not otherwise presented to the jury. A thorough review of the record demonstrates that Mr. Peacock understood the underlying facts of not only the case which he tried, but the facts and issues of the first case and first appeal. There has been no showing by Petitioner that Mr. Scremin possessed knowledge or evidence which was not already bore on the record in the subsequent trial. As such, I find that Mr. Peacock's failure to consult with Mr. Scremin did not reasonably affect the judgment in the case and thus there was no prejudice in his failure to call Mr. Scremin. *See Strickland*, 466 U.S. at 691.

2. Counsel Failed to Retain the Same Computer Expert

Petitioner's second sub-claim is that counsel failed to retain the same expert, Salvatore Rastrelli, from his first trial. Bates claims that he was prejudiced by the fact that he had to go to trial with an expert, Richard Connor, who he claims was a less qualified expert. Additionally,

[13] It is unclear whether Petitioner is claiming that Mr. Peacock should have used Mr. Scremin as a second attorney or used Mr. Scremin as a witness. Construing Petitioner's claim broadly, I address both possible arguments. *Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014) (holding that *pro se* filings must be liberally construed, including applications for habeas relief pursuant to 28 U.S.C. § 2255).

In his affidavit, Mr. Scremin states that Mr. Scremin notified Mr. Peacock that he would "cooperate in every way" and "in fact would even be a witness in the case." (ECF No. 10 at 9, ¶ 29). Petitioner avers that Mr. Scremin should have been "used as much as possible" (ECF No. 26 at 9). To the extent that Petitioner believes that Mr. Scremin should have been engaged as co-counsel on the case, the Florida Bar Rules would prohibit it. Florida Bar Rule 4-3.7 states: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client unless..." and then lists several exceptions not applicable to the present case. FL ST BAR Rule 4-3.7. Mr. Scremin's affidavit states that he believes that he would have been available to testify as a witness in the case, thus barring him from serving him as co-counsel under the Florida Bar Rules.

Petitioner claims that Mr. Peacock was deficient by not having the expert explain that there were other personal files stored in the same location as the child pornography files.

Initially it should be noted that Mr. Rastrelli offered no substantive testimony during the first trial, nor was he disclosed as an expert by Mr. Scremin in *Bates I*. Mr. Rastrelli was a former classmate of Petitioner (CRDE 286 at 49:11-12). Upon hearing about the case and following it in the news, Mr. Rastrelli reached out to Mr. Scremin and volunteered to testify as to whether the procedures of the Port St. Lucie Sherriff's Department had been followed correctly, despite never working for Port St. Lucie Sherriff's Department, or testifying to any familiarity with their procedures (*Id.* at 49:18-21). In the first trial, Mr. Scremin called Mr. Rastrelli to the stand, had him introduce himself and his background and was immediately objected to by the prosecution. The prosecution argued that Mr. Rastrelli had never provided a report and had never been disclosed as an expert (*Id.* at 48:4-8). The Court sustained the objection and excluded the witness because Mr. Rastrelli had not been disclosed as an expert and any testimony he would provide as to procedures of other police departments would have been impeachment through extrinsic evidence (*Id.* at 51:14-16).

Petitioner nonetheless argues that counsel was deficient for retaining Mr. Connor because Mr. Rastrelli would have offered more knowledge of Bates' personal history and behavioral profile. He further argues that Mr. Connor did not present a "complete forensic analysis" (ECF No. 26).

What Petitioner fails to appreciate is that under *Strickland*, the standard is not what the best course of action, or which expert is the best to call, rather, the question is whether a reasonable attorney would have taken the course of action which Mr. Peacock took. As stated in *Chandler v. United States*:

> If a defense lawyer pursued course A, it is immaterial that some other reasonable courses of defense (that the lawyer did not think of at all) existed and that the

> lawyer's pursuit of course A was not a deliberate choice between course A, course B, and so on. The lawyer's strategy was course A.... [O]ur inquiry is limited to whether this strategy, that is, course A, *might* have been a reasonable one.

218 F.3d at 1315 n.16 (11th Cir. 2000); *see also Gordon v. United States*, 518 F.3d 1291, 1302 (11th Cir. 2008) (citing *Chandler*, 218 F.3d at 1315 n.16) (finding an evidentiary hearing unnecessary when a court can conceive of reasonable motivations for counsel's actions in denying a claim of ineffective assistance of counsel). Therefore, the inquiry is not whether one expert was better than the other, but rather, whether counsel's selection and retention of Mr. Connor was reasonable.

In *Bates II*, Mr. Peacock secured the services of Mr. Connor as both a consulting and testifying expert. Mr. Connor is a lawyer who graduated from both Princeton University and Stetson University College of Law (CRDE 378 at 118:22-24). He is certified to conduct forensic analysis by numerous organizations and has testified in over 90 cases as an expert witness at both the state and federal levels (*Id.* at 120:3).

Mr. Connor performed a forensic examination of the mirror image of the laptop at issue (*Id.* at 120:20-21). Mr. Connor testified that he began his examination of the laptop by reviewing the government's disclosed discovery materials to get a background of the case and to understand where the files in question were located (*Id.* at 121:4-13). Mr. Connor testified that he found evidence on the computer that could be attributed to someone other than Petitioner (*Id.* at 123:11-15). He indicated further that he could not say definitively who did or did not use the computer (*Id.* at 123:18-20). He also testified that when Detective Parow turned on the computer that it "changed in many ways" (*Id.* at 129:1-2). Beyond that, Mr. Connor testified that the computer would not hibernate when closed, and would begin automatically downloading any pending files in the Frostwire software when it was reconnected to wireless internet (*Id.* at 130-32). Although Petitioner states that Mr. Rastrelli would have been a better expert because of his personal

knowledge of Petitioner, the question is not whether one expert is better than the other. Considering Mr. Connor's qualifications, experience testifying, and the testimony he gave at the trial, it was reasonable for Mr. Peacock to engage and call Mr. Connor as an expert witness in this case.

Petitioner cites to *Hinton v. Alabama* and *Lawhorn v. Allen* in his Reply for the proposition that Mr. Peacock's failure to speak with Mr. Rastrelli was deficient performance. 571 U.S. 263 (2014); 519 F.3d 1272 (11th Cir. 2008). However, in *Hinton*, the Supreme Court found that it was unreasonable for counsel to fail to seek additional funds to hire an expert where that belief was not based on any strategic choice but a mistaken belief that available funding was capped at $1,000. *Id.* at 273. As to *Lawhorn*, the court there found that counsel's decision to waive closing argument during a death penalty phase of sentencing was deficient when it was based not on strategic choice but on misunderstanding of Alabama criminal procedure law. *Lawhorn*, 519 F.3d at 1295. Both decisions turned on the fact that counsel had an unreasonable mistaken belief as to the law. No such mistaken belief about the law is here alleged by Petitioner.

Petitioner also claims that Mr. Peacock was deficient in not having Mr. Connor explain that personal files belonging to individuals other than Petitioner were stored in the same space that Petitioner stored his personal files and where the child pornography files were stored. While Mr. Connor did not use those specific words, he did testify to the fact that the forensics demonstrated that there was use inconsistent with that of Petitioner's on the laptop at issue (CRDE 404 at 123). Additionally, Mr. Connor testified that individuals using other computers could have accessed the folder in which the child pornography was stored from computers other than the laptop at issue, demonstrating the fact that the folder at issue was not only capable of being accessed by Petitioner (*Id.* at 137-38). Accordingly, Bates has shown no prejudice from Mr. Peacock's alleged failure to ask the specific question he now suggests Mr. Peacock should have asked.

3. Counsel Failed to Raise the Double Jeopardy Issue

Petitioner's third sub-claim is that Mr. Peacock was deficient because he "overlooked the double jeopardy issue" (ECF No. 26 at 11). As discussed above, Petitioner's Double Jeopardy Clause challenge is procedurally barred for failure to raise it during his direct appeal. However, whether Mr. Peacock was deficient in failing to raise that issue "before, at, and after trial" is an argument that pertains to whether he was ineffective at trial and thus may be raised herein (ECF No. 26 at 11). The government argued in response that Mr. Peacock was not ineffective because an attorney cannot be ineffective for failing to raise a frivolous argument. The Court agrees. Because the Double Jeopardy Clause is plainly not implicated in this case, Petitioner can demonstrate no prejudice by Mr. Peacock's failure to raise it. *United States v. Winfield,* 960 F.2d 970, 974 (11th Cir. 1992) ("[A] lawyer's failure to preserve a meritless issue plainly cannot prejudice a client."). Therefore, Petitioner's claim fails the *Strickland* standard and thus should be denied.

4. Counsel's Failure to Call Additional Witnesses to Attest to Use of the Laptop

Petitioner's fourth sub-claim alleges that Mr. Peacock was deficient in his choice of which witnesses to call. He states that Mr. Peacock failed to call C. Davis and should have "parad[ed] a half dozen [witnesses] before the jury" that would have testified they used the computer at various times (ECF No. 26 at 13). Petitioner claims he was prejudiced by the failure to call Davis and others because the jury was unable to see corroboration of his defense that others used the computer.

At trial, Mr. Peacock called three witnesses who all testified that the computer was a family computer, that it was openly accessible by anyone in the Bates' household, and that Bates let anyone use it. Additionally, Petitioner's expert, Mr. Connor, testified that one of the folders that had the child pornography in it was accessible by other computers connected to the same wireless

network as the laptop at issue. Despite this evidence, Petitioner alleges that if counsel had called other witnesses, and specifically Davis, it would have shown that others used the computer at issue and that he was prejudiced by Mr. Peacock's failure to do so.

As to the fact witnesses, first, the defense called Rosemary Russell. Mrs. Russell was Petitioner's sister-in-law (the sister of his wife). Mrs. Russell testified that she would be at Petitioner's house frequently and at varying times of the day (CRDE 404 at 166:2-14). She testified that she had seen the computer at issue in the Bates' residence as well as at her father's house (*Id.* at 167:1-2). She testified that she has also seen other people use the computer on multiple occasions and that it was not uncommon to see the computer being used by people at the Bates' household (*Id.* at 167:19-25). Kelly Russell similarly testified that he visited the Bates' house regularly (*Id.* at 173:25), that he identified the computer as "being the family computer," (*id.* at 174:7), and that others, including himself, have used the computer (*Id.* at 175:7-16). Petitioner's then-wife, Barbara McCourtney Bates, testified that she had purchased the computer new with her husband, had used the computer, and has seen others using the computer (*Id.* at 189:16-25). Mrs. Bates also testified to a specific instance when Davis' girlfriend, Des, used the computer to look up the signs and symptoms of MRSA (*Id.* at 192:9-24). As to Davis' specific use of the computer, Mrs. Bates and Mr. Peacock engaged in the following back and forth:

> Mr. Peacock: Let me ask you about [C.] Davis. Was that Ben's best friend?
> Mrs. Bates: Yes.
> Mr. Peacock: Was he over at the house frequently?
> Mrs. Bates: Yes.
> Mr. Peacock: Did you ever see [C.] Davis use the computer, which is Government's Exhibit 36?
> Mrs. Bates: Yes.
> Mr. Peacock: Did you check up on what he was using the computer for?
> Mrs. Bates: No.
> Mr. Peacock: Would it be unusual in the Bates' household to see him or his friends jumping on the computer for one reason or another?
> Mrs. Bates: Absolutely not.
> Mr. Peacock: And when I say, the computer, I mean this particular computer.

Mrs. Bates: That is correct.

(*Id.* at 190-91). Petitioner contends that Mr. Peacock should have, after receiving Davis' Grand Jury testimony, called Mr. Davis and the five identified users from that testimony as witnesses because Mr. Davis admitted to using the computer at issue (ECF No. 26 at 13). Petitioner has not identified any unique testimony that Mr. Davis would have offered other than the fact that he used the computer, evidence which was presented to the jury through both Det. Valentine and Mrs. Bates. In fact, Petitioner acknowledges that Mr. Davis would have denied downloading child pornography (ECF No. 26 at 13).

"Which witnesses, if any, to call and when to call them, is the epitome of a strategic decision." *Waters*, 46 F.3d at 1512. Although Mr. Peacock did not call Mr. Davis, his failure to do so was not deficient or do to a lack of understanding. As shown above, Mr. Peacock did understand the crux of the government's argument (that Mr. Bates was the user of the computer downloading child pornography) and put forth an adequate defense (that Mr. Bates was not the only user of the computer, and therefore others may have downloaded the pornography). The record further shows that counsel was well-aware of Davis' testimony to the Grand Jury, as he used it to impeach the case agent and to support an inference that the sheriff's office failed to fully investigate the source of the illicit activity.[14]

To the extent that Petitioner claims he suffered prejudice from counsel's failure to call the additional witnesses, counsel is not required to call additional witnesses to present "redundant or cumulative evidence." *Ford v. Hall*, 546 F.3d 1326, 1338 (11th Cir. 2008) (citing *Jennings v. McDonough*, 490 F.3d 1230, 1244 (11th Cir. 2007, *cert. denied*, 552 U.S. 1298 (2008); *Marquad*

[14] Detective Valentine acknowledged on cross-examination that he was aware that C. Davis had testified to the Grand Jury, but denied knowing, in response to defense counsel's questions, that Davis testified that he had used the computer. Counsel then questioned Valentine about his efforts to interview a series of other individuals who had been in the home and used the computer, elicited a series of responses revealing that the detective had not made efforts to interview them (CRDE 408 at 235—37).

v. Sec'y for Dep't of Corr., 429 F.3d 1278, 1307 (11th Cir. 2005)). Counsel almost always can do more, but the question is whether counsel acted reasonably. *Putman v. Head*, 268 F.3d 1223, 1245 (11th Cir. 2001).

Counsel did call witnesses to prove this defense by calling Mr. and Mrs. Russell and Mrs. Bates to demonstrate that others not only had access to the computer, but actually used it. There is no reasonable probability that if counsel would have called six, seven, or any other number of people to testify to essentially the same facts that three other witnesses had unequivocally stated that the result would have been different; that is, that a jury would have acquitted as opposed to convicted Petitioner. *See Waters* 46 F.3d at 1512 (finding that counsel was not required to put forward redundant evidence stating "[t]here is much wisdom for trial lawyers in the adage about leaving well enough alone."). Any additional witnesses that testified that they, or others used the computer would have been redundant or cumulative to that of Mr. and Mrs. Russell and Mrs. Bates.

The evidence pointing to Petitioner as the user that was downloading child pornography was significant. Through the four day trial the prosecution was able to demonstrate that the pornography was downloaded at various locations that only Petitioner went (CRDE 409 at 107-08, 112-13); it was downloaded at times when Petitioner's personal files, such as paralegal files, were accessed in close proximity to the child pornography files being accessed and the downloads occurring (CRDE 409 at 264-66); and that Petitioner at first admitted to downloading the files but claimed it had been an accident (CRDE 408 at 192-93).

Accordingly, I find that Petitioner suffered no prejudice by Mr. Peacock not calling Davis and the five other identified witnesses as their testimony would be redundant and cumulative and thus Petitioner's claim fails to demonstrate actual prejudice and fails the *Strickland* test.

Petitioner's Reply also cites to *Johnson v. Zerbst*; *Gideon v. Wainwright*; *Strickland v. Washington*; and *Powell v. Alabama* for the general proposition that if a defendant does not receive

effective assistance of counsel then the court lacks jurisdiction to punish him (ECF No. 32). 304 U.S. 458 (1938); 372 U.S. 335 (1963); 466 U.S. 668 (1984); 287 U.S. 45 (1932). While Petitioner is correct that a defendant's failure to receive effective assistance of counsel divests the court of jurisdiction to punish him, there has been no showing here that his counsel was ineffective in representing him. Therefore, the Court did have jurisdiction to render its judgment and sentence. As such, I recommend that Petitioner's claims for ineffective assistance of counsel be denied.

5. Failure to Object to the Two-Level Enhancement for Distribution

In his final claim, Bates faults counsel for not arguing *enough* at sentencing against the application of a two-level enhancement for the knowing distribution of child pornography. Counsel filed written objections prior to sentencing to the application of the enhancement based on evidence that the subject computer downloaded images using peer-to-peer software and argued at the sentencing hearing that the Court had the discretion, under the circumstances, to not apply the enhancement (CRDE 390). Bates argues now, having not raised the argument on direct appeal, that there was no evidence of distribution. The government in opposition notes only that Bates was convicted of distribution without elaboration. Having reviewed the trial transcript, the undersigned recommends the Court deny this claim.

At trial, there was evidence admitted that Bates distributed child pornography from the computer. Det. Valentine describe his ability to pull a file containing child pornography from the computer named in the indictment on June 1, 2012 (CRDE 408 at 145-46)); the government argued in its closing argument that this evidence supported a conviction for the crime of distribution charged in Count 5. The detective who conducted the search of the computer similarly testified that the computer was engaged in file sharing:

Q. Now, peer-to-peer, it goes both ways; is that also correct?
A. Depending on user setting, yes. That's the purpose is to distribute files.
Q. Was this computer, in fact, distributing files?
A. Yes.

(CRDE 404 at 219). Detective Ray proceeded then to explain how he determined that, forensically. As explained above more fully, the overwhelming evidence that it was Bates' computer and that he alone was responsible for the illicit activities conducted on it. Counsel's failure to avoid the enhancement for distribution accordingly was decidedly not deficient, as the enhancement was firmly supported by both the law and the evidence at trial.

f. No Need for Evidentiary hearing

Although § 2255 mandates that a court conduct an evidentiary hearing unless the motion and record conclusively show that the movant is entitled to no relief, a petitioner must support his allegations with at least a proffer of some credible supporting evidence. *See, e.g., Chandler v. McDonough*, 471 F.3d 1360, 1363 (11th Cir. 2006); *Scott v. United States*, 325 F. App'x 822, 824 (11th Cir. 2009) (where a § 2255 motion is supported by nothing more than generalized allegations that are affirmatively refuted from the record, no evidentiary hearing is necessary); *see also Hill v. Moore*, 175 F.3d 915, 922 (11th Cir. 1999) ("To be entitled to an evidentiary hearing on this matter [an ineffective assistance of counsel claim], petitioner must proffer evidence that, if true, would entitle him to relief."). A hearing is not required on frivolous claims, conclusory allegations unsupported by specifics, or contentions that are wholly unsupported by the record. *See, e.g., Peoples v. Campbell*, 377 F.3d 1208, 1237 (11th Cir. 2004); *Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002) (no evidentiary hearing is required "where the petitioner's allegations are affirmatively contradicted by the record, or the claims are patently frivolous").

As discussed above, Bates has not adequately supported his claims with credible evidence. We conclude that the pending Motion can be decided from the record that evidences conclusively that Bates is not entitled to relief. Consequently, we need not conduct an evidentiary hearing on his § 2255 Motion. *See* 28 U.S.C. § 2255; *see also Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) ("An evidentiary hearing is not required when 'the motion and the files and

records of the case conclusively show that the prisoner is entitled to no relief.'" (quoting 18 U.S.C. § 2255)). Bates's reliance on *Williams v. United States*, 660 F. App'x 847, 850 (11th Cir. 2016), is misplaced. The Eleventh Circuit there held that contested fact issues cannot be decided on affidavits alone, and that an evidentiary hearing is required to determine any fact that, if contested, would entitle Petitioner to relief. *Id.* at 850. In this case there are no such contested facts, the record as a whole conclusively shows that Bates is not entitled to relief and no hearing is required.

Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the Parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the District Judge. Failure to timely file objections shall bar the Parties from de novo determination by the District Judge of any factual or legal issue covered in the Report and shall bar the Parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. *See* 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *Patton v. Rowell*, 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security*, 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida, this 2nd day of January 2020.

LAUREN LOUIS
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10700-H

CAMERON DEAN BATES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: GRANT and LAGOA, Circuit Judges.

BY THE COURT:

Cameron Bates has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's February 5, 2021, order denying a certificate of appealability ("COA") and *in forma pauperis* ("IFP") status on appeal from the denial of his underlying 28 U.S.C. § 2254 habeas corpus petition. Upon review, Bates's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Additional material from this filing is available in the Clerk's Office.