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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

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BRUCE ALLEN RUTHERFORD #27006-078 §

versus §

UNITED STATES OF AMERICA §

CIVIL ACTION NO. 4:19-CV-348  
CRIMINAL ACTION NO. 4:17-CR-41(1)

**ORDER OF DISMISSAL**

The above-entitled and numbered civil action was referred to United States Magistrate Judge Christine A. Nowak, who issued a Report and Recommendation (#47) concluding that the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed pursuant to 28 U.S.C. § 2255 should be denied and dismissed with prejudice. Movant filed objections (#49).

In the objections, Movant reurges the ineffective assistance of counsel claims that he raised in the § 2255 motion. Despite his arguments, Movant fails to show that, but for his counsel's deficient performance, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Furthermore, Movant claims for the first time that Counsel failed to convey plea offers to him, which entitles him to relief. However, issues raised for the first time in objections are not properly before the court and need not be addressed. See *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992); see also *United States v. Cervantes*, 132 F.3d 1106, 1111 (5th Cir. 1998) (district court does not abuse its discretion in refusing to consider new issues in a § 2255 after the Government filed its response). Movant fails to show the Report and Recommendation is in error or that he is entitled to habeas relief.

The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by Movant to the Report, the Court is of the opinion

Ground Two: Defense Counsel Edgett was ineffective for failing to file a motion to suppress the Affidavit to support the search warrant as bare bones and seriously lacking in probable cause.

Petitioner argues that an Affidavit is bare bones " if it is so deficient in probable cause that it renders an officer's belief in its existence completely unreasonable." For example, an affidavit that merely states that the Affiant "has cause to suspect and does believe or has received reliable information from a credible person that contraband is located on the premises" are bare bones. *United States v. McPhearson*, 469 F.3d 518 (6th Cir. 2006).

Ground Three: Defense Counsel Edgett was ineffective for failing to file a motion to compel the Government to comply with the Jencks Act 18 U.S.C. §3500.

Petitioner argues that Counsel Edgett was ineffective for failing to recognize, investigate and assert the the Government failed to the alleged confession and evidence in support of the Grand Jury testimony of Detective Jeff Rich at the hearing on March 8, 2017 concerning the alleged statements made by petitioner.

*Brady v. Maryland*, 373 U.S. 83, 83, S. Ct. 1194, 10 L Ed. 2d 215 (1962) Counsel Edgett's ineffectiveness denied the defense of critical information as to the actual existence of this evidence and would have had substantial effect on the outcome of the defense's case.

Ground Four: Defense Counsel Edgett was ineffective for failing to file a pretrial motion for a Judgment of Acquittal.

Petitioner argues that failing to file a pretrial motion for a Judgment of Acquittal put the defense at a great disadvantage and unprepared to defend against evidence that was not disclosed by the failure to include in its discovery. This is a violation of Petitioner's Sixth and Fourteenth Amendments for Effective Counsel and due process.

Ground Five: Defense Counsel Edgett was ineffective for failing to inform Petitioner of plea offers from the Government was Ineffective Assistance of Counsel.

The Docket shows that the Government had presented plea bargains to the petitioner that was never disclosed to Petitioner by Counsel Edgett. *Cullen v. United States*, 194 F.3d 401 (2nd Cir 1999). *Missouri v. Fyre*, 182 L Ed.2d 379 (2012).

any time while the case is pending.” Fed. R. Crim. P. 12(b)(2). A post-conviction motion to dismiss an indictment is “in essence, ‘a meaningless, unauthorized motion,’ which the district court [is] without jurisdiction to entertain.” *United States v. Perez*, 611 F. App’x 210, 211 (5th Cir. 2015) (quoting *United States v. Early*, 27 F.3d 140, 142 (5th Cir.), *cert. denied*, 513 U.S. 1027 (1994)). Movant’s failure to raise these issues prior to his guilty plea procedurally bars review of the issues on collateral review. *Shaid*, 937 F.2d at 231. Moreover, in direct contradiction to Movant’s assertions, the record shows that Counsel filed a motion to suppress and a motion in limine. Crim. ECF (Dkt. ##30, 31). Therefore, to the extent he complains about Counsel’s failure to file such motions, he is simply mistaken.

Finally, the Fifth Circuit rejected the issues of whether Movant’s plea was knowing and whether the Court erred in applying the enhancement provisions to his sentence. *Rutherford*, 762 F. App’x 178. Thus, these issues may not be relitigated here. *Kalish*, 780 F.2d at 508.

## **V. INEFFECTIVE ASSISTANCE OF COUNSEL**

Movant asserts he is entitled to relief based on ineffective assistance of counsel claims that relate to his guilty plea. In the interest of justice, the Court will examine those issues in more detail.

A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction requires the defendant to show the performance was deficient and the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). “Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.” *Id.* at 700. A movant who seeks to overturn his conviction on the grounds of ineffective assistance of counsel must prove his entitlement to relief by a preponderance of the evidence. *James v. Cain*, 56 F.3d 662, 667 (5th Cir. 1995). The standard requires the reviewing court to give great deference to counsel’s performance.

Ground Thirteen: Defense Counsel Edgett was ineffective for failing to order the transcripts from the hearing to obtain the search warrant

Petitioner submits that Counsel Edgett was ineffective for failing to order the search warrant hearing transcripts. The transcripts would have given the defense better insight into the reason behind getting the search warrant issued. The search warrant affidavit appears to be bare bones and based on unsupported hearsay.

Ground Fourteen Defense Counsel Edgett was ineffective for failing to inform Petitioner of his defense strategy and prepare Petitioner for trial.

Petitioner argues that Counsel Edgett failed to inform and discuss with Petitioner of any defense strategy that he may have had not meeting with Petitioner for any trial preparation

Ground Fifteen: Defense Counsel Edgett was ineffective for failing to perform an inspection and verification of Government's evidence and obtain copies of any copies of forensic tests, reports chain of custody of the evidence and any tools that were used or methods used for testing and evaluation. Elmore v. Ozmin, 661 F.3d 783.

Ground Sixteen: Defense Counsel Edgett was ineffective for fail to withdraw Petitioner's guilty plea after three separate requests to do so.

Petitioner argues that Counsel Edgett was ineffective for failing to withdraw Petitioner's guilty plea after three separate requests to do so. Petitioner did not receive any response from Counsel on any of the requests. Holtan v. Parrarr, 683 F.2d 1163 (11th Cir 1982). Petitioner filed a complaint with the Texas Bar Association

1                   wrong?

2                   THE DEFENDANT: Possession of --

3                   THE COURT: What?

4                   THE DEFENDANT: -- child pornography.

5                   THE COURT: All right. And did -- what age  
6                   children were depicted in that child pornography?

7                   THE DEFENDANT: I -- I don't know the exact ages,  
8                   but they were -- my guess is under 12.

9                   THE COURT: And did they appear to be  
10                   prepubescent?

11                   THE DEFENDANT: I believe so, yes.

12                   THE COURT: All right. And what quantity  
13                   approximately did you possess?

14                   THE DEFENDANT: I -- I know that there were I  
15                   think several -- four or five, six videos -- honestly, I  
16                   can't remember. There was too many.

17                   THE COURT: Well, but you have here in your  
18                   factual basis a particular amount, more than 600 images  
19                   and videos. Is that correct?

20                   THE DEFENDANT: Yes. Yes, ma'am.

21                   MS. MILLER: Your Honor, if I might clarify. Just  
22                   for purposes of that calculation, each video constitutes  
23                   75 images. I do note, too, that there were both saved,  
24                   as well as incomplete downloads, as well as deleted  
25                   images and videos.

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

March 29, 2021

No. 20-40619

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

BRUCE ALLEN RUTHERFORD,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 4:17-CR-41-1

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Before WILLETT, HO, and DUNCAN, *Circuit Judges.*

PER CURIAM:\*

Bruce Allen Rutherford, federal prisoner # 27006-078, has moved for leave to proceed in forma pauperis (IFP) on appeal from the denial of his self-styled motion under Federal Rule of Civil Procedure 52 in which he contested the factual basis supporting his guilty plea conviction for possession of child pornography. To appeal IFP, Rutherford must make the necessary economic

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

showing and assert nonfrivolous issues on appeal. *See Carson v. Polley*, 689 F.2d 562, 586 (5th Cir. 1982); *see also Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997); FED. R. APP. P. 24(a).

Regardless of whether he is able to afford the costs of litigation without undue hardship or deprivation of life's necessities, *see Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948), Rutherford has not raised a claim that is arguable on the merits, *see Howard v. King*, 707 F.2d 215, 220-21 (5th Cir. 1983). He effectively seeks to appeal from a motion that is unauthorized or meaningless or that does not permit him to obtain the relief that he seeks. *See, e.g., United States v. Early*, 27 F.3d 140, 142 (5th Cir. 1994). Federal Rule of Civil Procedure 52 does not apply to criminal matters, *see FED. R. CIV. P. 1; FED. R. CIV. P. 52*, and Federal Rule of Criminal Procedure 52, which does apply, is inapposite and does not provide a basis for Rutherford to attack collaterally his conviction, *see FED. R. CRIM. P. 52; United States v. Frady*, 456 U.S. 152, 163 (1982). If the motion was treated as a 28 U.S.C. § 2255 motion, his challenge to the factual basis would not be cognizable because he unsuccessfully raised a similar claim on appeal. *See United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986). Because he has a § 2255 motion pending in the district court, any possible amendment or filing implicating that motion should be presented in connection with that ongoing proceeding. *See FED. R. CIV. P. 15(a)(1), (2)*. Rutherford otherwise has not shown that he has a nonfrivolous challenge to the disposition of his motion. *See Howard*, 707 F.2d at 220-21.

Accordingly, the appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 202 n.24; *Howard*, 707 F.2d 220-21; *see also 5TH CIR. R. 42.2*. The IFP motion is DENIED. *See id.* Rutherford is ORDERED to pay a sanction of \$100 to the clerk of this court, and he is BARRED from filing in this court or any court subject to this court's jurisdiction a challenge to his conviction and sentence until the sanction is paid, unless he obtains leave of

the court in which he seeks to file such challenge. Rutherford is once again WARNED that any repetitive or frivolous filings in this court or any court subject to this court's jurisdiction will invite the imposition of further sanctions, including dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court's jurisdiction.

(5) Affiant states that on Setember 5, 2017, I was at the Federal Courthouse in Plano, TX waiting for my trial to start. Counsel Edgett came into the holding area to talk to me. Counsel Edgett told me that if I went through with the trial I was going to loose and I would get 20 years. I asked Mr. Edgett why I would loose, I wasn't guilty of anything. Mr. Edgett said that the images were found on a computer that I owned. I told Mr. edgett that I I didn't know that they were there. Mr. Edgett said that if I changed my plea to guilty I would only get 5 years, what do I want to do. I told him that I didn't want either one but 5 years is better then 20. It sounds like I don't have any choice. I asked Mr. Edgett what I needed to do. He said that he would take care of it and he would be right back. Mr. Edgett came back a few minutes later and told me we were going into the courtroom to change my plea and he would guide me through it so that the judge would accept mu guilty plea. I answered the judges questions just as he told me to. I knew nothing about the law, that's why I hired an attorney.

(6) Counsel Edgett not only gave me false information to get me to change my plea, He never told me about the consequences and the constitutional rights I would be loosing by changing my plea to guilty.

(7) Counsel Edgett's statements to me concerning the 5 year sentence was completely false. I received a 150 month sentence. I do not believe Mr. Edgett had developed any kind of defense and was completely unprepared for for my defense.

(8) After I changed my plea, I was returned to Fannin County Jail. During the course of the next two to three weeks I was learning about what I had given up by changing my plea to guilty. Counsel Edgett never told me anything about any of this. Over the next 3 months I wrote Mr. Edgett 3 letters telling him I wanted him to withdraw my guilty plea. I didn't get any response from Mr. Edgett on any of the letters. I finaly filed a a complaint with the Texas Bar Association listing several complaints. I had no communication from Mr. Edgett for slmost eight months.