IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-10888-E

PATRICK KILLEN, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Patrick Killen, Jr. is a federal prisoner serving a sentence of 50 years' imprisonment for child pornography offenses. He now moves for leave to proceed in forma pauperis ("IFP") and for a certificate of appealability ("COA") to appeal the denial of his 28 U.SC. § 2255 motion to vacate, the denial of an evidentiary hearing on the motion, the Magistrate Judge's limitation on the number of claims he could file, and the District Court judge's failure to recuse.

I.

A federal grand jury indicted Mr. Killen with multiple felony counts stemming from his alleged use of a messaging application to obtain and distribute sexually explicit images of minors.[1]

Mr. Killen filed a motion for release on bond pending trial. After a hearing, the District Court denied the motion, finding Mr. Killen was a danger to the community in light of the nature of the offenses, the victims affected, and the limits on the ability of the court to monitor his internet activity outside of prison. The court ordered psychological counseling during Mr. Killen's pretrial detention.

Mr. Killen also moved to suppress his alleged confession and evidence discovered on his electronic devices. Detectives arrived at his home to pursue a lead regarding internet crimes committed by a person posing as "Rebecca Till" on the "Kik" messaging application. A minor victim had reported that Till requested nude

[1] Specifically, the superseding indictment charged Mr. Killen with: three counts of causing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, in violation of 18 U.S.C. § 2251(a) and (e) (Counts 1, 3, and 5); two counts of distributing visual depictions of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(2) and (b)(1) (Counts 2 and 7); two counts of extortion by threatening to post images of the victims if they refused to send pictures of themselves, in violation of 18 U.S.C. § 875(d) (Counts 4 and 6); four counts of receiving visual depictions of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2256(2) (Counts 8–11); two counts of possessing visual depictions of a prepubescent minor engaged in sexually explicit conduct, in violation of § 2252(a)(4)(B) and (b)(2) (Counts 12 and 15); two counts of possessing visual depictions of a minor engaged in sexually explicit conduct, in violation of § 2252(a)(4)(B) and (b)(2) (Counts 13 and 16); and one count of altering, destroying, concealing, and covering evidence with the intent to impede, obstruct and influence the case against him, in violation of 18 U.S.C. § 1519 (Count 14).

photographs and then threatened him into sending additional photographs. Police questioned Mr. Killen, who consented to a search of his laptop, iPad, cell phone, and two thumb drives. He then confessed to posing as Till. After an evidentiary hearing, the District Court denied Mr. Killen's motion to suppress, finding Killen had not been in custody during the home interview and had consented to the search and voluntarily cooperated with police.

Before trial, the government filed a motion in limine to exclude any evidence related to an insanity defense or a psychological condition negating the intent element of the crimes charged, noting that Mr. Killen said he may call an expert witness regarding his mental condition. The government argued Mr. Killen had not provided timely notice of his intent to do so and, in any event, the offenses were general intent crimes and Killen's mental condition was irrelevant to the issues of guilt. The District Court agreed on both points and granted the motion.

At trial, the government presented evidence showing Mr. Killen posed as a young girl on Kik and began online conversations with teenage boys, soliciting sexually explicit photos, extorting additional content by threatening to post photos of the boys, and distributing these photos to another Kik user. United States v. Killen, 729 F. App'x. 703, 706 (11th Cir. 2018) (unpublished). All told, the government said Mr. Killen came to possess over 2,000 images and 100 videos of child pornography on his personal electronic devices. The parents of some of the

victims testified. Tara Frost testified that her minor son informed her that he sent several nude photographs to a person he did not know on Kik, and she confirmed her son's Kik username. Heather Freeman testified as to her minor son's Kik username. Terry Cook testified he recognized his minor son's Kik account information when it was shown to him by the government. Mr. Killen himself testified and admitted to soliciting child pornography and to the extortion conduct.

The jury found Mr. Killen guilty on all counts except for the destruction of evidence count (Count 14), and the court sentenced him to 139 years' imprisonment.

On direct appeal, Mr. Killen challenged his sentence as procedurally and substantively unreasonable. He also raised the claims as in Claims 11, 14, 16, and 17 in the instant § 2255 proceeding. We affirmed his convictions but vacated his sentences as substantively unreasonable and remanded for resentencing before a different District Court judge. See Killen, 729 F. App'x. at 706.

On remand, Mr. Killen requested a 15-year sentence. He said he lived in a Romanian orphanage from June 1993 until he was adopted in 1997, and that, when he arrived in the United States, he weighed just 24 pounds and had scars on his upper arms and legs from being bound to his crib. He explained the conditions in Romanian orphanages adversely impacted the children institutionalized there. He also noted a psychologist's evaluation revealed he was not likely to recidivate, and that he bore psychological scars from his first 3.5 years of life which could be

addressed with medication and cognitive behavioral therapy. Mr. Killen also asserted he had been abused in prison.

Mr. Killen submitted the psychological evaluation of Dr. Michael DiTomasso, who diagnosed Killen with persistent depressive disorder, adjustment disorder, and mixed personality disorder with dependent, avoidant, and obsessive-compulsive features. He found Mr. Killen was timid, socially regressed, emotionally immature, and continued to bear psychological scars of the first 3.5 years of his life. Dr. DiTomasso found there appeared to be little risk of actual contact offending because Mr. Killen was not actually interested in having sex with another person and he never attempted to meet any of the victims in his case. Further, the doctor noted Mr. Killen did not have a criminal history or a history of violent offenses, major mental health or psychotic disorders, or substance abuse.

The government argued for a sentence between 80 to 110 years and referred to Mr. Killen as a "pedophile." The prosecutor also referred to Mr. Killen sharing photos and videos with "like-minded pedophiles." Counsel did not object to the use of the word "pedophile."

The District Court acknowledged Mr. Killen's abusive childhood and his abuse in prison, but pointed out he had not expressed remorse for his crimes or the victims, whose nude photographs were on the internet and could resurface at any

time. The court imposed a 50-year sentence, which was below the maximum possible sentence of 274 years' imprisonment.

Once again on appeal, Mr. Killen challenged his sentence as procedurally and substantively unreasonable and in violation of the Eighth Amendment's proportionality principle, the same claim as in Claim 19 in the instant § 2255 motion. We affirmed his sentence. United States v. Killen, 773 F. App'x 567, 569 (11th Cir. 2019) (per curiam) (unpublished).

Mr. Killen then filed pro se a 28 U.S.C. § 2255 motion to vacate, raising 22 claims substantially similar to the claims listed above. He attached a 132-page memorandum in support and 234 pages of exhibits. A Magistrate Judge issued an order directing Mr. Killen to file an amended § 2255 motion complying with the Federal Rules of Civil Procedure and the Southern District of Florida Local Rule 7.1, which required "a short and plain statement" of the claims not to exceed 20 pages. The Magistrate Judge allowed him a total of 30 pages in his amended motion.

In the amended § 2255 motion, Mr. Killen raised the same 22 claims but in a 29-page complaint.[2] The government filed an opposition. Following the government's response, the Magistrate Judge entered an order directing Mr. Killen to file a second amended § 2255 motion. The Magistrate Judge noted the amended

[2] This count excludes the pages preceding the first page of his argument, which are not counted for purposes of the Local Rules. See S.D. Fla. L.R. 7.1(c)(2).

motion's length "considerably exceeds this court's 20-page limit on a § 2255 motion," and found the number of claims raised did "not necessarily positively correlate with its likelihood for success." In order to "facilitate the orderly and expeditious administration of justice," the Magistrate Judge limited his second amended § 2255 motion to a total of 8 claims, including any subclaims.

Mr. Killen then filed a second amended § 2255 motion. He raised 3 grounds for relief but included subclaims and additional issues and argument within each ground. The District Court found he had raised a total of 21 claims, noting that although Mr. Killen "purport[ed]" to raise only three claims, "properly understood," the petition actually "assert[ed] 21 district claims." As such, the District Court proceeded to enumerate and analyze all 21 claims individually:

(1) trial counsel failed to argue the pornographic videos were automatically downloaded onto Mr. Killen's computer without his permission;

(2) trial counsel failed to challenge the indictment as insufficient;

(3) trial counsel failed to adequately investigate the charged conduct, alleged victims, and electronic evidence;

(4) trial counsel failed to file a motion to dismiss for lack of evidence;

(5) trial counsel failed to argue the pornographic evidence did not belong to Mr. Killen;

(6) trial counsel failed to consult with Mr. Killen;

(7) trial counsel failed to challenge the denial of bond;

(8) trial counsel failed to challenge the government's failure to provide counseling when Mr. Killen was a pretrial detainee;

(9) trial counsel failed to call forensic experts and the victims as witnesses;

(10) trial counsel failed to provide notice of his intent to introduce the testimony of a mental health expert at trial;

(11), (13) prosecutorial misconduct in the search and seizure of evidence at Mr. Killen's home, and violation of multiple federal statutes;

(12) prosecutorial misconduct in accessing Mr. Killen's cell-site information without a warrant;

(14) prosecutorial misconduct during Mr. Killen's interrogation;

(15) prosecutorial misconduct by destroying and manipulating evidence;

(16) prosecutorial misconduct by allowing hearsay evidence from the parents of the victims;

(17), (19) trial court violated the Eighth Amendment by imposing Mr. Killen's sentence;

(18) trial court held Mr. Killen as a pretrial detainee for a length of time in violation of 18 U.S.C. § 3161;

(20) Mr. Killen is actually innocent in light of a psychological report filed in connection with his resentencing; and

(21) prosecutorial misconduct in referring to Mr. Killen as a pedophile at resentencing.

The government responded in opposition to the motion and attached the affidavit of Mr. Killen's trial counsel, Fred A. Schwartz. Mr. Schwartz attested he worked diligently with a trial investigator to review the evidence against Mr. Killen

and come up with a defense strategy agreed to by Killen—that Killen was immature for his age, curious about other boys, had no intent to commit the crimes, and the images did not constitute child pornography. Mr. Schwartz retained the services of a computer forensic expert, Robert Moody, who despite spending a week analyzing the electronic evidence could not conclude that Mr. Killen did not produce, download, possess, or distribute child pornography. Mr. Schwartz also retained the services of a psychologist and a psychiatrist to interview Mr. Killen to discern possible mental defenses. He chose not to obtain a written report from either expert because a significant portion of their conclusions corroborated the government's charge that Mr. Killen had extorted the victims. Thus, Mr. Schwartz attested, he believed neither Mr. Moody nor the mental health experts would be beneficial to the defense.

Mr. Schwartz also attested he considered calling one of the minor victims at trial but decided against it, as it would not serve the defense in light of Mr. Killen's confession and the electronic evidence against him, and in fact would likely lead to additional sympathy for the victims. Mr. Schwartz attested he chose not to challenge the legal sufficiency of the indictment given his opinion that the government correctly charged the offenses. He attested he shared all non-pornographic discovery with Mr. Killen. He also attested he advised Mr. Killen not to testify, but Killen

chose to do so and was "less than respectful to the Judge and engaged in harmful altercations with the prosecutor" which did not reflect well on him.

The government also attached a copy of an email from the U.S. Probation Office explaining the Bureau of Prisons ("BOP") does not offer sex offender treatment services for pretrial detainees and, thus, could not comply with the court's order for Mr. Killen to receive such counseling.

The District Court denied Mr. Killen's § 2255 motion, denied him an evidentiary hearing, and denied a COA. It later denied him leave to proceed IFP on appeal.

Mr. Killen now seeks a COA in order to appeal the denial of his § 2255 motion, the denial of an evidentiary hearing, the Order limiting the number of claims he could file, and the District Court judge's failure to recuse. Mr. Killen also seeks leave to proceed IFP.

II.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000) (quotation marks omitted). Where the District Court

denied a habeas petition on procedural grounds, the movant must show reasonable jurists would find debatable whether: (1) the petition states a valid claim of the denial of a constitutional right; and (2) the District Court was correct in its procedural ruling. Id.

To establish ineffective assistance of counsel, a petitioner must show (1) his attorney's performance was deficient, and (2) the deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. To make such a showing, a defendant must demonstrate "no competent counsel would have taken the action that his counsel did take." United States v. Freixas, 332 F.3d 1314, 1319–20 (11th Cir. 2003) (quotation omitted). Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

Conclusory claims, unsupported by facts or argument, cannot entitle a movant to § 2255 relief. Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991).

Substantive Claims

Claims raised on direct appeal: 11, 14, 16, 17, and 19

In Claim 11, Mr. Killen argued police illegally searched his home and electronic equipment because they did not first obtain a search warrant. In Claim 14, he argued the police interview in his home violated his due process rights. In Claim 16, he argued the parents' testimony at trial violated the Sixth Amendment. In Claim 17, he argued his initial total sentence of 139 years' imprisonment violated the Eighth Amendment. Finally, in Claim 19, he argued his current 50-year sentence violated the Eighth Amendment and 18 U.S.C. § 3533. The District Court denied these claims because Mr. Killen raised them on direct appeal and they had been resolved by this Court.

"The District Court is not required to reconsider claims of error that were raised and disposed of on direct appeal." United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000). "[O]nce a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255." Id. Here, in his direct appeal of his initial sentence, Mr. Killen raised the same claims as in Claims 11, 14, 16, and 17. In his direct appeal of his current sentence, he raised the same claim as in Claim 19. Thus, he cannot relitigate these claims in his § 2255 motion.

Procedurally defaulted claims: 13, 15, and 21

In Claim 13, Mr. Killen argued the search of his home and electronic devices violated the Stored Communications Act, 18 U.S.C. § 2703(a). In Claim 15, he

argued the government manipulated the evidence obtained from this search and prevented him from reviewing such evidence. In Claim 21, he argued the prosecutor at his resentencing improperly referred to him as a "pedophile." The District Court found Claims 13 and 15 conclusory and procedurally defaulted because Mr. Killen could have, but did not, raise the issues on direct appeal. It found Claim 21 meritless.

Claims that could have been raised on direct appeal are procedurally barred from review in a § 2255 proceeding. Lynn v. United States, 365 F.3d 1225, 1234 (11th Cir. 2004) (per curiam). A defendant can overcome this procedural bar by establishing either (1) cause for the default and actual prejudice from the alleged error, or (2) actual innocence. Id. "In procedural default cases, the question is . . . whether at the time of the direct appeal the claim was available at all." Id. at 1235.

Here, reasonable jurists would not debate the District Court's determination that Claims 13 and 15 were procedurally defaulted, as they were available to Mr. Killen on direct appeal and he made no argument below that he was entitled to either exception for the default. In fact, Mr. Killen did not raise these claims on direct appeal even though he raised other challenges to the search. Even if these claims were not defaulted, however, both claims consist of conclusory allegations—he does not allege how the government manipulated the evidence and counsel attested he shared all non-pornographic discovery with him. See Tejada, 941 F.2d at 1559. Additionally, Mr. Killen could have, but did not, raise Claim 21 on direct appeal and

did not argue he was entitled to an exception for his default. Thus, these claims are procedurally defaulted.

Claims not cognizable in a § 2255 proceeding: claims 7, 8, and 18

In Claim 7, Mr. Killen argued trial counsel failed to appeal his denial of bond. In Claim 8, he argued counsel failed to challenge the government's failure to comply with the trial court's order that he receive counseling while awaiting trial. In Claim 18, he argued he was held in pretrial detention for a period of 122 days and in solitary confinement for 30 days, in violation of 18 U.S.C. § 3161 and his due process rights, respectively. The District Court denied these claims, finding they were not cognizable in a § 2255 proceeding.

Section 2255 provides the vehicle for a federal prisoner to challenge the legality of his conviction or sentence. 28 U.S.C. § 2255. When a prisoner "challenges the 'circumstances of his confinement' but not the validity of his conviction and/or sentence, then the claim is properly raised in a civil rights action under [42 U.SC.] § 1983." Hutcherson v. Riley, 468 F.3d 750, 754 (11th Cir. 2006). See also Kett v. United States, 722 F.2d 687, 690 (11th Cir. 1984) ("[C]laims of excessive bail are not cognizable in a section 2255 action.") (per curiam). Because these claims concern only the conditions of Mr. Killen's pretrial detention and not the validity of his convictions or sentences, they are not cognizable in a § 2255 motion.

Claims 1 and 5:

In Claim 1, Mr. Killen argued counsel failed to raise as a defense that the child pornography videos were automatically downloaded onto his computer without his permission or intent. In Claim 5, he argued counsel failed to assert the evidence produced did not belong to him.

Counsel attested he retained a computer forensic expert who examined Mr. Killen's devices and the evidence obtained from those devices. He attested the expert could not conclude Mr. Killen did not "produce, download, possess or distribute child pornography." In addition, evidence at trial showed Mr. Killen's electronic devices contained over 2,000 images and 100 videos of child pornography. He confessed to the charged offenses and at trial admitted to soliciting child pornography and extortion. Thus, Mr. Killen cannot make the requisite showing of either deficiency or prejudice under Strickland.

Claims 2 and 3:

In Claim 2, Mr. Killen argued counsel failed to challenge the sufficiency of the indictment, where the government did not "identify" and "produce" the alleged victims and evidence against him. He argued this prejudiced him because he could not adequately prepare for his defense. In Claim 3, he argued counsel inadequately prepared for trial.

Counsel attested he reviewed the indictment and found it to be sufficient. Mr. Killen does not allege in what way the indictment was defective, and his conclusory allegation fails. See Tejada, 941 F.2d at 1559. As to Mr. Killen's claim counsel failed to inadequately prepare for trial, counsel attested he worked diligently with a trial investigator to review the evidence and come up with a defense strategy agreed to by Mr. Killen. He retained a computer forensic expert to review Mr. Killen's electronic devices and the electronic evidence against him. He also retained two mental health experts. And he located one of the victims and considered calling him as a witness, but ultimately decided not to because he felt it would create additional sympathy for the victim. Thus, contrary to Mr. Killen's contention, the identity of the victims and the evidence against him were available to counsel and adequately investigated, and he cannot make the requisite showing of either deficiency or prejudice under Strickland.

Claims 4 and 6:

In Claim 4, Mr. Killen argued counsel failed to move for dismissal based on insufficiency of the evidence and because there was no evidence of any illegal activity. In Claim 6, Mr. Killen argued counsel failed to consult with him about the absence of evidence against him.

At trial, evidence was presented that Mr. Killen solicited child pornography and extorted additional photos and videos from the victims. He shared these photos

and videos with other people. He confessed to this conduct during his initial questioning, and at trial he admitted his confession was "essentially" accurate. He also admitted at trial to soliciting child pornography and extortion. On direct appeal, we noted the "overwhelming evidence of [his] guilt on the offenses of conviction." See Killen, 729 F. App'x. at 714. Thus, contrary to Mr. Killen's assertions, there was substantial evidence of illegal activity against him.

Claim 9:

In Claim 9, Mr. Killen argues counsel failed to call as trial witnesses a computer forensics expert, a mental health expert, and the victims. As discussed in Claim 1, counsel retained a computer forensic expert in this case, but after reviewing the materials the expert could not offer the opinion that someone other than Mr. Killen produced, downloaded, possessed or distributed child pornography. Counsel also retained two mental health experts to examine Mr. Killen but chose not to obtain a written report from either because a significant portion of their conclusions corroborated the government's charge that he had extorted the victims. Finally, counsel considered calling one of the victims but decided against it, as he believed it would not serve the defense in light of Mr. Killen's confession and the electronic evidence against him, and instead would likely lead to additional sympathy for the victims. Thus, counsel attested, he believed none of the experts or the victims would be beneficial witnesses for the defense. "[S]trategic choices made after thorough

investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Thus, Mr. Killen cannot make the requisite showing of either deficiency or prejudice under Strickland.

Claim 10:

In Claim 10, Mr. Killen argued counsel failed to secure the testimony of a mental health expert at trial because he gave no notice of his intent to introduce such testimony. He argued such an expert would have testified his "mental condition [wa]s not consistent with the offenses charged." The District Court agreed counsel had been deficient, but found Mr. Killen could not show prejudice in light of the overwhelming evidence against him.

Here, as discussed in Claim 9, counsel attested he had retained two mental health experts prior to trial but ultimately decided not to obtain a written report from either expert because a significant portion of their conclusions corroborated the government's charge that Mr. Killen had extorted the victims. The only evidence in the record regarding Mr. Killen's mental health is from Dr. DiTomasso during Killen's resentencing, who found Killen did not meet the criteria for a diagnosis of pedophilia and had little risk of actual-contact offending. Even if a mental health expert had testified at trial as to Mr. Killen's mental condition, there is no reasonable probability he would not have been convicted of the offenses in light of the other evidence against him, such as the substantial amount of child pornography images

and videos found on his electronic devices, his confession to police, and his testimony at trial. Thus, even if counsel's performance was deficient, Mr. Killen cannot make the required showing of prejudice under Strickland.

Claim 12:

In Claim 12, Mr. Killen argued the government accessed his cell-site information without a warrant, in violation of the Fourth Amendment. The government responded it did not obtain any cell-site information nor was any introduced at trial. Mr. Killen did not dispute this in his reply brief, nor point to where in the record this alleged cell-site information was referenced or used against him, and his conclusory claim is insufficient. See Tejada, 941 F.2d at 1559.

Claim 20:

In Claim 20, Mr. Killen argues Dr. DiTomasso's report filed in connection with his resentencing constitutes newly discovered evidence and shows his actual innocence. Dr. DiTomasso's report concluded Mr. Killen did not meet the criteria for a diagnosis of pedophilia and that he had little risk of actual-contact offending. But this conclusion would not have exonerated him from the charges, in light of the "overwhelming evidence of [his] guilt on the offenses of conviction." See Killen, 729 F. App'x. at 714.

Non-substantive claims

Magistrate Judge's order limiting Mr. Killen's § 2255 motion to eight claims:

Mr. Killen argues the District Court erred in limiting his § 2255 motion to eight claims.

This circuit has no precedent concerning the number of claims a § 2255 movant is entitled to raise. The same Magistrate Judge here issued a similar order in a different § 2255 case before us, but limited the movant to twelve claims. See Ramdeo v. United States, Case No. 21-10112. In Ramdeo, the movant complied with the order and reduced the amount of his claims from 22 to 12, the Magistrate Judge recommended denying the motion, and the District Court did so. There, we granted a COA on the following issue: "Whether the District Court erred by imposing a limit on the number of claims that the movant could raise in his second amended 28 U.S.C. § 2255 motion to vacate?" Id., ECF No. 10. In doing so, we noted the lack of precedent regarding the number of claims a § 2255 movant could raise and that it was debatable whether such a limitation infringed on the movant's ability to access the federal courts through § 2255.

However, Mr. Killen's case differs in a crucial respect from Ramdeo, because the District Court here actually considered all 21 claims raised in Killen's second amended § 2255 motion, which were essentially the same claims raised prior to the Magistrate Judge's order. Though Mr. Killen "purport[ed]" to comply with the Magistrate Judge's order, Killen in fact asserted—and the District Court actually considered—all 21 claims he sought to bring. Thus, the Magistrate Judge's order

did not infringe on his ability to access the federal courts through § 2255, and any error in the Magistrate Judge's direction to limit the number of claims would be considered harmless on this record.

Failure to Hold an Evidentiary Hearing:

We ordinarily review the denial of an evidentiary hearing in a § 2255 proceeding for abuse of discretion. Winthrop-Redin v. United States, 767 F.3d 1210, 1215 (11th Cir. 2014). As discussed above, the "records of the case conclusively show that [Mr. Killen] is entitled to no relief" on the issues he seeks a COA, and, thus, an evidentiary hearing in the District Court was not required. See 28 U.S.C. § 2255(b).

Failure to Recuse:

In his motion for a COA, Mr. Killen argues the District Court judge in his § 2255 proceedings should have recused himself because he was the same judge who imposed his current 50-year sentence. He argues this conflict of interest resulted in the denial of his § 2255 motion.

"[A]dverse rulings alone do not provide a party with a basis for holding that the court's impartiality is in doubt." United States v. Berger, 375 F.3d 1223, 1227 (11th Cir. 2004) (per curiam). Further, Mr. Killen provides no authority for his argument that a District Court judge cannot preside over both a criminal case and a

related post-conviction proceeding, and his conclusory statement of bias is insufficient. See Tejada, 941 F.2d at 1559.

CONCLUSION:

Because Mr. Killen has not shown reasonable jurists would find debatable both the merits of his underlying claims and the procedural issues he seeks to raise, see Slack, 529 U.S. at 478, 120 S. Ct. at 1604, his motion for a COA is DENIED. His motion for leave to proceed IFP is DENIED as moot.

Barbara B. Martin
UNITED STATES CIRCUIT JUDGE

United States District Court
for the
Southern District of Florida

Patrick J. Killen, Jr., Movant,	)	
	)	
v.	)	Civil Action No. 19-24916-Scola
	)	Crim. Action No. 15-20106-Scola
United States of America, Respondent.	)	

Order Denying Second Amended Motion to Vacate

The Movant has filed a Second Amended Motion to Vacate under 28 U.S.C. § 2255 ("SAM"). (Cv-ECF Nos. 21–22). As discussed below, the Court denies the SAM.

1. Background

"In 2013, when Mr. Killen[1] was nineteen, he began posing as a young girl on Kik, which is a messaging-based mobile-phone application." *United States v. Killen*, 729 F. App'x 703, 706 (11th Cir. 2018) (per curiam). "Using the names 'Rebecca Till' or 'Chanel Izzabel,' Mr. Killen began online conversations with teenage boys." *Id.* "He sent the boys images of a partially dressed young girl and asked the boys to send him nude photos of themselves in return." *Id.* "The boys agreed and sent photos of themselves, standing naked before a mirror, with their faces and genitalia visible." *Id.* "After agreeing to the initial requests, some of the boys tried to end their contact with Mr. Killen." *Id.* "Mr. Killen in turn threatened these boys that he would post their nude photos on social media platforms, like Instagram, unless they continued to send him more nude photos." *Id.* "The threatened boys complied." *Id.* "Sometimes, Mr. Killen directed the boys to assume particular poses." *Id.* "Mr. Killen distributed these photos to another Kik user, 'Vanyher.'" *Id.* "He also came to possess a lot of child pornography—over 2,000 images and 100 videos—on his personal electronic devices."

"Law-enforcement offices, including the Federal Bureau of Investigation, began getting complaints about someone using Mr. Killen's usernames in 2013." *Id.* "One of these complaints led the FBI to Mr. Killen's residence in Hialeah, Florida." *Id.* "On February 11, 2014, Special Agents Laura Schwartzenberger and Jason Ginther interviewed Mr. Killen at his home." *Id.* "During the interview, Mr. Killen admitted to being 'Rebecca Till' and asking

[1] "Mr. Killen" refers to the Movant.

boys ages fourteen or fifteen to send him nude images." *Id.* "He also consented to the search of his electronic devices." *Id.*

"Mr. Killen was arrested over a year later." *Id.* "A superseding indictment charged him with the following: coercing or employing a minor for the purpose of producing child pornography, in violation of 18 U.S.C. § 2251(a) and (e) (Counts 1, 3, 5); distribution and receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2) and (b)(1) (Counts 2, 7–11); extortion by interstate threats, in violation of 18 U.S.C. § 875(d) (Counts 4, 6); possession of child pornography involving a visual depiction of a prepubescent minor younger than 12, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2) (Counts 12, 15); possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2) (Counts 13, 16); and destruction of evidence, in violation of 18 U.S.C. § 1519 (Count 14)." *Id.*

"Before trial, Mr. Killen filed a motion to suppress his February 2014 confession as well as the search of his electronic devices." *Id.* "After a suppression hearing, the Magistrate Judge issued a report and recommendation ('R&R') recommending the motion be denied." *Id.* at 706–07. "The R&R was then adopted in full by the District Court." *Id.* at 707. "After a 5-day trial, a jury convicted Mr. Killen on all counts except for Count 14, which related to the destruction of evidence." *Id.* "The District Court sentenced Mr. Killen to [139 years'] imprisonment." *Id.*

"On appeal Mr. Killen challenge[d] the District Court's denial of his suppression motion, the sufficiency of the superseding indictment, the admission and exclusion of certain evidence, and the sufficiency of the evidence to sustain his conviction on certain counts." *Id.* "He also argue[d] that his sentence [was] procedurally and substantively unreasonable, and that it violate[d] the Eighth Amendment." *Id.*

The Eleventh Circuit affirmed his convictions but vacated his sentence, finding that it was substantively unreasonable. *Id.* at 706, 717. In affirming the Movant's convictions, the Eleventh Circuit found that "there was [] overwhelming evidence of Mr. Killen's guilt on the offenses of conviction." *Id.* at 714. In this regard, "FBI Agent Melissa Starman testified about the evidence recovered from Mr. Killen's personal electronic devices, including: saved conversations between Mr. Killen and the victims; saved conversations between Mr. Killen and other internet users interested in child pornography; photographs and videos containing child pornography; use of file-sharing software; and incriminating internet searches." *Id.* "Agent Schwartzenberger testified about Mr. Killen's confession during the February 2014 interview." *Id.* "And Mr. Killen himself testified and admitted to soliciting child pornography and to the extortion conduct." *Id.* at 714–15. "Mr. Killen also confirmed that

Agent Schwartzenberger's testimony about what he said in his confession was 'essentially' correct." *Id.* at 715.

"On remand, [this Court] imposed a 50-year sentence." *United States v. Killen*, 773 F. App'x 567, 569 (11th Cir. 2019) (per curiam) ["*Killen II*"]. The Movant appealed, arguing that the new sentence was procedurally and substantively unreasonable and violated the Eighth Amendment. *Id.* The Eleventh Circuit rejected these arguments and affirmed. *Id.* at 569, 571.

The Movant timely filed a motion to vacate under § 2255, which he twice amended. (Cv-ECF Nos. 1, 9, 21–22). The SAM purports to assert three claims (ineffective assistance of counsel, prosecutorial misconduct, and newly discovered evidence) and eight total subclaims. (Cv-ECF No. 22 at 2). However, properly understood, the SAM asserts 21 distinct claims, all of which the Movant supports with vague and conclusory allegations. (*See generally id.*) The Court declines to follow the Movant's misleading categorization of his claims and will analyze the claims that he actually presented.

The Government responded. (Cv-ECF No. 27). The Movant replied. (Cv-ECF No. 29). The reply adds nothing of substance to the SAM.

2. Ineffective Assistance of Counsel Principles

To establish a claim of ineffective assistance of counsel, the Movant must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To prove deficiency, he must show that counsel's performance "fell below an objective standard of reasonableness" as measured by prevailing professional norms. *Id.* at 688. Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "[A]n attorney will not be held to have performed deficiently for failing to perform a futile act, one that would not have gotten his client any relief." *Pinkney v. Sec'y, DOC*, 876 F.3d 1290, 1297 (11th Cir. 2017).

To prove prejudice, the Movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The Movant has the burden of proof on his ineffectiveness claim, *Holsey v. Warden*, 694 F.3d 1230, 1256 (11th Cir. 2012) (citation omitted), as well as the burden of proof under § 2255, *Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017) (collecting cases).

3. Discussion

A. Claim 1

The Movant alleges that counsel ineffectively failed to argue that he was innocent because pornographic videos were automatically downloaded onto his computer without permission. (Cv-ECF No. 22 at 4, 6). The Movant's vague and conclusory description of how these videos ended up on his computer does not satisfy *Strickland*. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) ("A convicted defendant making a claim of ineffective assistance must *identify the acts or omissions of counsel* that are alleged not to have been the result of reasonable professional judgment." (emphasis added)); *Borden v. Allen*, 646 F.3d 785, 810 (11th Cir. 2011) (section 2255 movant's allegations must satisfy the "heightened pleading requirement[s]" under Rule 2 of the Federal Rules Governing § 2255 Proceedings); *Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992) (per curiam) ("Conclusory allegations of ineffective assistance are insufficient." (citation omitted)).

Notably, moreover, trial counsel declares that he retained "the services of [a] computer forensic examiner . . . and his associate" and that their "team could not conclude that Mr. Killen, Jr. did not produce, download, possess or distribute child pornography." (Cv-ECF No. 27-2 ¶ 6). Additionally, the Movant possessed 2,000 images of child pornography, not just videos. *Killen*, 729 F. App'x at 706.

In short, the Movant cannot show deficiency or prejudice on this claim.

B. Claim 2

The Movant alleges that counsel failed to challenge the defective indictment. (Cv-ECF No. 22 at 4). However, counsel declares that it was his "professional opinion that the government correctly charged the violations." (Cv-ECF No. 27-2 ¶ 8). The Movant's wholly conclusory allegations cannot overcome the presumption that this decision was reasonable. *See Strickland*, 466 U.S. at 690; *Borden*, 646 F.3d at 810; *Wilson*, 962 F.2d at 998.

C. Claim 3

Claim 3 is not fully clear. The Movant alleges that counsel failed to "identify the conduct and produce the alleged victims and original evidence that purportedly violated the statutes." (Cv-ECF No. 22 at 4). He adds that counsel conducted an inadequate pretrial investigation. (*Id.* at 5).

This claim is wholly conclusory and, therefore, meritless. Notably, moreover, trial counsel declares that: (1) the Movant could not go to the FBI to review the child pornography because he was denied bond pending trial; (2)

counsel provided him with all the discovery that did not contain child pornography; and (3) he never requested to see child pornography. (Cv-ECF No. 27-2 ¶ 5). Counsel mentions several other actions he took to investigate the case, including retaining a forensic expert and "a psychologist and psychiatrist to interview [the Movant] to discern possible mental defenses." (*Id.* ¶¶ 6–7). Additionally, although counsel "located at least one of the minor alleged victims named in the superseding indictment," he did not believe the victim's testimony "would advance any viable defense theory; and, in fact would create additional sympathy for the alleged victims." (*Id.* ¶ 8). This deliberative "strategic choice[]" is "virtually unchallengeable." *See Strickland,* 466 U.S. at 690.

In short, claim 3 lacks merit.

D. Claim 4

The Movant alleges that counsel ineffectively failed to argue that the evidence was insufficient. (Cv-ECF No. 22 at 5). Likewise, he alleges that counsel ineffectively failed to move to dismiss the case because the Government did not have evidence of illegal activity. (*Id.*)

This claim fails because it is wholly conclusory. Furthermore, counsel did file a motion to suppress the Movant's statements to the FBI agents and the evidence derived from consent searches of his electronic devices. (Cr-ECF No. 35). Additionally, the Eleventh Circuit found that the evidence of his guilt was overwhelming, which belies the notion that the Government lacked evidence of illegal activity.

In sum, this claim fails.

E. Claim 5

The Movant alleges that counsel ineffectively failed to argue that the evidence produced did not belong to him. (Cv-ECF No. 22 at 5). This apparent claim is not meaningfully distinct from claims 1 and 4 and fails for the same reasons.

F. Claim 6

The Movant alleges that counsel ineffectively failed to consult with him. (Cv-ECF No. 22 at 6). This claim fails because it is wholly conclusory and, in any event, contradicted by the record. (Cv-ECF No. 27-2 ¶¶ 5, 8).

G. Claim 7

The Movant alleges that counsel ineffectively failed to appeal to the District Judge the Magistrate Judge's denial of bond. (Cv-ECF No. 22 at 7). However, "the denial of bail, which does not affect either the conviction or sentence, is not ordinarily a cognizable issue in a § 2255 motion." *Hitas v.*

United States, No. 3:11-CR-264-J-37JRK, 2019 WL 2717169, at *2 (M.D. Fla. June 28, 2019) (alteration adopted) (citations omitted).

Assuming this claim were cognizable, it would still fail. The Movant's wholly conclusory allegations fail to show that the District Judge would have overruled the Magistrate Judge's determination. Furthermore, even had the Court set bond and the Movant obtained pretrial release, his wholly conclusory allegations do not support a reasonable inference that there would have been a reasonable likelihood of a more favorable outcome at trial. In short, the Movant has not shown prejudice.

Claim 7 fails.

H. Claim 8

The Movant alleges that counsel ineffectively failed to challenge the Government's failure to obtain counseling for him when he was a pretrial detainee. (Cv-ECF No. 22 at 7). It is true that Magistrate Judge Turnoff ordered that he receive counseling while in custody. (Cr-ECF No. 28 at 36–37, 44). However, the Bureau of Prisons did not offer "sex offender treatment services for pretrial or presentence detainees." (Cv-ECF No. 27-3 at 2). The Movant's wholly conclusory allegations are insufficient to show that any objection by counsel would have changed this outcome.

If the Movant alleges that he did not receive any mental health care as a pretrial detainee and that counsel failed to challenge this omission, this claim would not be cognizable under § 2255. *See Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006) ("When an inmate challenges the circumstances of his confinement but not the validity of his conviction and/or sentence, then the claim is properly raised in a civil rights action . . . ." (citation and internal quotation marks omitted)). And, if this claim were cognizable here, the Movant has not shown that any objection by counsel would have changed this outcome.

If Movant alleges that counsel ineffectively failed to have a mental health expert evaluate him, this is untrue. (Cv-ECF No. 27-2 ¶ 7).

In sum, claim 8 lacks merit.

I. Claim 9

The Movant alleges that counsel ineffectively failed to call forensic experts and victims as witnesses. (Cv-ECF No. 22 at 8). As noted, counsel explored this possibility and, after a thorough investigation, concluded that presenting such witnesses would be unhelpful and potentially counterproductive. (Cv-ECF No. 27-3 ¶¶ 6, 8). This decision was not deficient. *See Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) ("Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and

it is one that we will seldom, if ever, second guess." (citation omitted)). Nor was it prejudicial considering the overwhelming evidence of the Movant's guilt. This claim fails.

J. Claim 10

The Movant alleges that counsel ineffectively failed to secure the advice and assistance of a psychologist before trial because he gave no notice of his intent to introduce such testimony. (Cv-ECF No. 22 at 8). It is true that the Court excluded expert testimony about his mental state because counsel failed to give notice of such testimony under Federal Rule of Criminal Procedure 12.2. *Killen*, 729 F. App'x at 712. The Court assumes that this failure was deficient. However, the Movant cannot show prejudice considering the overwhelming evidence of his guilt. Furthermore, counsel declares that, based on the evaluation of a psychologist and psychiatrist, "an expert on Mr. Killen, Jr.'s mental state would not be beneficial to the defense." (Cv-ECF No. 27-2 ¶ 7). The Movant's wholly conclusory allegations fail to show otherwise. In short, the Movant cannot show prejudice on this claim.

K. Claim 11

The Movant alleges that the Government committed misconduct by searching his home and electronic equipment without a search warrant. (Cv-ECF No. 22 at 10). The Eleventh Circuit rejected this argument on direct appeal. *Killen*, 729 F. App'x at 707–10. The Movant cannot relitigate this issue here. *Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014) ("It is long settled that a prisoner is procedurally barred from raising arguments in a motion to vacate his sentence, 28 U.S.C. § 2255, that he already raised and that we rejected in his direct appeal." (collecting cases)).

L. Claim 12

The Movant appears to allege that the Government accessed his cell site information without a warrant, in violation of the Fourth Amendment. (*See* Cv-ECF No. 22 at 11–12). For starters, this claim is unsupported and conclusory and fails for this reason alone. *See Beeman*, 871 F.3d at 1222; *Borden*, 646 F.3d at 810; *see also Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014) (movant must allege more than vague and conclusory facts to obtain an evidentiary hearing under § 2255). Furthermore, the Government contends that it did not use cell site information at trial. (Cv-ECF No. 27 at 12). Because the Movant has not disputed this representation, (*see generally* Cv-ECF No. 29), and because counsel for the Government has a duty of candor to

the tribunal, *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994), the Court accepts as true this representation. Thus, claim 12 fails.

M. Claim 13

The Movant cursorily cites a smattering of federal statutes that the Government's search allegedly violated. (Cv-ECF No. 22 at 11–12). Again, such conclusory allegations are insufficient for relief under § 2255. *See Beeman*, 871 F.3d at 1222; *Borden*, 646 F.3d at 810; *see also Winthrop-Redin*, 767 F.3d at 1216. Moreover, for the reasons in the Government's response, these conclusory contentions are procedurally defaulted. (Cv-ECF No. 27 at 12–17). In short, the Movant did not raise these claims on direct appeal and has not shown cause for not raising them or that he is actually innocent. Indeed, he did not respond to the Government's procedural default argument in his reply. (*See generally* Cv-ECF No. 29); *see also Lucas v. Sec'y, Dep't of Corr.*, 682 F.3d 1342, 1354 (11th Cir. 2012) ("[The petitioner] has not presented us with any argument about cause and prejudice or a miscarriage of justice to overcome the procedural bar."). In short, claim 13 lacks merit.

N. Claim 14

The Movant contends that the FBI investigators' questioning of him violated due process and a couple of federal statutes. (Cv-ECF No. 22 at 12–13). Movant cannot relitigate his due process claim here because the Eleventh Circuit rejected it on direct appeal. *Killen*, 729 F. App'x at 707–10; *see also Stoufflet*, 757 F.3d at 1239. His cursory citation to a couple of federal statutes is not sufficient for § 2255 relief. *See Beeman*, 871 F.3d at 1222; *Borden*, 646 F.3d at 810; *see also Winthrop-Redin*, 767 F.3d at 1216. Furthermore, any claim based on these statutes would be procedurally defaulted. *See supra* Part 3(M).

O. Claim 15

The Movant alleges that the prosecutor violated due process and the Federal Rules of Evidence by destroying, manipulating, and altering "non-original evidence." (Cv-ECF No. 22 at 13). Similarly, he alleges that he could not review and was not given certain original evidence. (*Id.* at 14–15). The Movant's arguments in this regard are vague, conclusory, and largely unclear. (*Id.*) These contentions fail for the same essential reasons that claims 13 and 14 fail. In short, they are too unsupported and conclusory to warrant § 2255 relief and they are procedurally defaulted. For good measure, the record refutes any suggestion that the Government failed to provide discovery to the Movant

or that he did not have an opportunity to review discovery. (Cv-ECF No. 27-2 ¶¶ 4–5).

P. Claim 16

The Movant alleges that the prosecution violated the Sixth Amendment by allowing parents to relay the accusatory hearsay statements of their children at trial. (Cv-ECF No. 22 at 15–16). The Movant cannot relitigate this claim here because the Eleventh Circuit rejected it on direct appeal. *Killen*, 729 F. App'x at 713–14.

Q. Claim 17

The Movant contends that the Court violated the Eighth Amendment by sentencing him to 139 years' imprisonment without parole. (Cv-ECF No. 22 at 16). This claim is moot because the Eleventh Circuit vacated his 139-year sentence and, on remand, the Court imposed a substantially lower sentence.

R. Claim 18

The Movant contends that he was held in pretrial detention for 122 days in violation of 18 U.S.C. § 3161. (Cv-ECF No. 22 at 16). Also, he alleges that he was held in solitary confinement for 30 days in violation of due process. (*See id.*)

The claim that he was held in solitary confinement for too long is not cognizable under § 2255. *See Riley*, 468 F.3d at 754. Assuming the alleged violation of § 3161 is cognizable here, it is procedurally defaulted because the Movant did not raise it on direct appeal. *See supra* Part 3(M). The same is true for his wholly conclusory allegation that he was arrested without probable cause. (Cv-ECF No. 22 at 16). This claim fails.

S. Claim 19

The Movant contends that the 50-year sentence imposed on remand violated the Eighth Amendment and 18 U.S.C. § 3533. (Cv-ECF No. 22 at 17). He cannot relitigate these claims here because the Eleventh Circuit rejected them on direct appeal. *Killen II*, 773 F. App'x at 570–71.

T. Claim 20

The Movant contends that the psychological report of Dr. DiTomasso, which counsel filed in connection with his resentencing hearing, constitutes newly discovered evidence making him actually innocent. (Cv-ECF No. 22 at 17). However, the Movant's allegation that the report would have exonerated him is conclusory. (*Id.* at 17–18). Because he does not meaningfully explain its significance, and because the evidence of his guilt was overwhelming, he has

not shown that it is "more likely than not that no reasonable juror would have convicted [him] in light of the evidence." *See Milton v. Sec'y, Dep't of Corr.*, 347 F. App'x 528, 532 (11th Cir. 2009) (per curiam) (citation and internal quotation marks omitted); *see also* (Cv-ECF No. 27 at 15–17). So this claim fails.

U. Claim 21

The Movant alleges that the prosecutor committed misconduct by telling the Court at sentencing that he is a pedophile. "To establish prosecutorial misconduct, (1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant." *United States v. Merrill*, 513 F.3d 1293, 1307 (11th Cir. 2008) (citation and internal quotation marks omitted). Here, considering the overwhelming evidence of his guilt, the Movant cannot satisfy either of these prongs. Claim 21 fails.[2]

4. Conclusion

Accordingly, the Court **denies** the SAM (Cv-ECF Nos. 21 & 22) and **denies** a certificate of appealability. The Clerk is directed to **close** this case. Further, the Clerk is **directed to mail** a copy of this order to the Movant at the below address.

Done and ordered, in chambers, in Miami, Florida, on January 25, 2021.

Robert N. Scola, Jr.
United States District Judge

Copies, via U.S. Mail, to
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United States Penitentiary
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Post Office Box 1034
Coleman, FL 33521
PRO SE

[2] No evidentiary hearing is warranted because "the files and records of the case conclusively show that the [Movant] is entitled to no relief." 28 U.S.C. § 2255(b).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-24916-CV-SCOLA
MAGISTRATE JUDGE REID

PATRICK J. KILLEN, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER FOR SECOND AMENDED MOTION

Movant has filed an amended motion to vacate under 28 U.S.C. § 2255. Because the amended motion is deficient, the court will order him to file a second amended motion to vacate.

Although movant filed a form motion, ECF No. 9, he alleges his claims for relief and arguments in support of thereof in a supporting memorandum titled: "Movant's Amended 28 USC § 2255 Motion to Vacate, Set Aside or Correct a Sentence." ECF No. 9-1. Excluding the table of contents and other excludable matter, the supporting memorandum is 29 pages long. This length considerably exceeds this court's 20-page limit on a § 2255 motion and its supporting memorandum. *See* S.D. Fla. Local Rule 7.1(c)(2).

Furthermore, including subclaims and separate instances of ineffective assistance of counsel, movant alleges 22 claims for relief. *See* ECF No. 9-1 at 2-3; ECF No. 18 at 1. But the number of claims raised in a habeas petition does not necessarily positively correlate with its likelihood for success. *See, e.g.*, *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017) ("Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed." (citations omitted)); *Jones v. Barnes*, 463 U.S. 745, 753 (1983) ("A brief that raises every colorable issue runs the risk of burying good arguments--those that[] . . . 'go for the jugular[.]'" (citation omitted)); *Chandler v. United States*, 218 F.3d 1305, 1319 (11th Cir. 2000) (en banc) ("Good advocacy requires 'winnowing out' some arguments . . . stress others."); *United States v. Battle*, 163 F.3d 1, 2 (11th Cir. 1998) ("Most cases present only one, two, or three significant questions . . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help[.] . . . " (quoting *Jones*, 463 U.S. at 752)).

Mindful of these principles, and to facilitate the orderly and expeditious administration of justice, movant's second amended petition **SHALL NOT CONTAIN MORE THAN EIGHT (8) GROUNDS FOR RELIEF**. *See generally Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) (it is axiomatic that "district courts have the inherent authority to manage their dockets . . . with a view toward the efficient and expedient resolution of cases." (collecting cases)).

As indicated above, movant may not assert several subclaims, or several instances of ineffective assistance of counsel, and have those alleged subclaims/instances treated as just one claim for relief. Likewise, movant may not attempt to circumvent the 20-page limit or 8-claim limit by reducing the size of the margins of his second amended motion or any supporting memorandum, leaving inadequate spacing between lines of text, or using a small text size. *See* S.D. Fla. L.R. 5.1(a)(4).

Accordingly, IT IS

ORDERED AND ADJUDGED as follows:

(1) On or before **October 29, 2020**, movant shall file a second amended § 2255 motion that complies with the applicable rules of procedure set forth in this order, and that cures the pleading deficiencies identified in this order. The form for § 2255 motions maintained by the Clerk of the Court is being provided to movant, together with this order.

(2) The second amended § 2255 motion must be labeled "Second Amended § 2254 Motion," and must show 0:18-cv-60834-RNS, so that it will be filed in this case.

(3) The second amended motion shall be the sole, operative pleading considered in this case, and only the claims listed therein will be addressed by the Court. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007) ("[A]n

amended complaint supersedes the initial complaint and becomes the operative pleading in the case."). Therefore, the second amended motion should in no way refer to movant's original filings, nor in any way incorporate by reference claims raised or arguments made therein. *See* S.D. Fla. Local Rule 15.1. Facts alleged and claims raised in movant's previous filings that are not specifically re-pleaded in the second amended motion will be considered abandoned and voluntarily dismissed. In addition, any claim set forth in the second amended motion must be timely filed, or it may be subject to dismissal pursuant to *Davenport v. United States*, 217 F.3d 1341 (11th Cir. 2000), as well as any other procedural bars and defenses that may apply.

(4) The second amended motion must not incorporate by reference arguments or text from any other documents, including any exhibits.

(5) The second amended motion must be filed (i.e., received by the court and docketed) by **October 30, 2020**. The court will NOT use the date on which movant signs the second amended motion or the date on which he submits it to prison authorities for mailing as the date of filing. Movant is cautioned that he must take any potential mailing delays into consideration when determining by when to submit his second amended motion to prison authorities for mailing. Failure to timely file his second amended motion by **October 30, 2020 will result in dismissal of this case**.

(6) Movant is further cautioned that failure to comply with this order **will result in dismissal of this case**, and that no further amendments will be permitted.[1]

DONE AND ORDERED at Miami, Florida this 30th day of September, 2020.

s/Lisette M. Reid

UNITED STATES MAGISTRATE JUDGE

Copies furnished:

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[1] A one-year statute of limitations applies to federal habeas petitions filed by state prisoners. 28 U.S.C. § 2244(d)(1).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 19-24916-CV-SCOLA
(15-20106-CR-SCOLA)
MAGISTRATE JUDGE REID

PATRICK J. KILLEN, JR.,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER TO MOVANT FOR AMENDED MOTION TO VACATE

This cause is before the Court upon Movant's *pro se* Motion to Vacate, filed pursuant to 28 U.S.C. § 2255 [ECF No. 1], and Memorandum of Law in Support. [ECF No. 3]. In the Motion to Vacate, Movant raises three main claims challenging his conviction and sentence in **Case No. 15-20106-CR-SCOLA**. [*Id.*]. However, review of the Motion and Memorandum of Law shows that Plaintiff's pleadings and attached exhibits are extremely voluminous, exceeding **380 pages**. [*Id.*].

The Court concludes that the Motion to Vacate should not be served on Respondent until Movant has had an opportunity to cure his Motion because, as currently pleaded, Movant's claims fail to comply with the Federal Rules of Civil Procedure and the Rules Governing Section 2255 Proceedings.

Plaintiff, though *pro se*, is still required to comply with the Federal Rules of Civil Procedure and the Local Rules of the Southern District of Florida. *See Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989). Failure to comply with the Rules may result of dismissal of the entire action pursuant to the Court's inherent authority to manage its cases. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991); *see also Brutus v. International Equity Lifestyle Properties, Inc. v. Florida Mowing & Landscape Serv., Inc.*, 556 F.3d 1232, 1240-41 (11th Cir. 2009).

The Federal Rules of Civil Procedure provide, in pertinent part, that a pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When plaintiffs fail to set forth a legally sufficient claim for relief because the complaint fails to comport with the rules, its usefulness is substantially diminished. Still, *pro se* plaintiffs should ordinarily be afforded an opportunity to amend. *Mederos v. United States*, 218 F.3d 1252, 1253 (11th Cir. 2000).

The Court must hold the allegations of a *pro se* civil rights complaint to a less stringent standard than formal pleadings drafted by lawyers. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). However, 380 pages is far too long to be considered a short and plain statement. For example, Plaintiff's factual history of his criminal case is nearly ninety pages long. Plaintiff's three grounds can be more effectively raised in an amended motion to vacate that complies with the rules.

The Undersigned notes that the Court will only consider claims raised by Movant in his amended § 2255 motion, and that any claims raised in the first motion to vacate that are not included in the amended motion shall be deemed to be waived. In short, the amended § 2255 motion shall be the operative motion in this case.

Movant is advised that the local rules require that a motion and its incorporated memorandum of law **shall not exceed twenty (20) pages**, absent prior permission from the Court. *See* S.D. Fla. L.R. 7.1(c)(2). With this in mind, the Court will allow Movant an additional ten (10) pages, for a total of **thirty (30) pages**. It is noted that title pages preceding the first page of argument, tables of contents and authorities, signature pages, certificates of good faith conference, and certificates of service are not counted for purposes of the local rules. *See id.*

The use of a prescribed form, required by Rule 2(c) Governing § 2255 Proceedings, as well as S.D. Fla. L.R. 88.2(a)(3), was adopted for reasons of administrative convenience. Movant is required to complete the form even if he needs to attach pages setting forth additional grounds and supporting facts.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. On or before January 6, 2020, Movant shall file an amended § 2255 motion that complies with the rules of procedure set forth in this Order that cures the deficiencies identified in this Order. The form for § 2255 motions maintained by the Clerk of the Court is being provided to Movant with this Order.

2. The amended motion must be labeled "Amended § 2255 Motion" and must show **Case No. 19-24916-CV-SCOLA** so that it will be filed in this case.

3. The Amended § 2255 Motion shall be the sole, operative pleading considered in this case, and only the claims listed therein will be addressed by the Court. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007); *see also* S.D. Fla. L.R. 15.1. Therefore, the Amended Motion should in no way refer to Movant's original filing, nor in any way incorporate by reference claims raised or arguments made in that filing. Facts alleged and claims raised in Movant's previous filings that are not specifically repleaded in the Amended Motion will be considered abandoned and voluntarily dismissed. *See id.*

4. Movant is further advised that submission of exhibits at this time is unnecessary. Respondent will be required to submit in conjunction with its answer those portions of the record that it deems relevant.

5. Movant is cautioned that failure to comply with this order may result in dismissal, and that no further amendments will be permitted absent a showing of good cause.

DONE AND ORDERED at Miami, Florida, on this 3rd day of December, 2019.

s/Lisette M. Reid
UNITED STATES MAGISTRATE JUDGE

cc: **Patrick J Killen, Jr.**
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Additional material from this filing is available in the Clerk's Office.