United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 13, 2022
Lyle W. Cayce
Clerk

No. 21-40502

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RUBEN JAMES RIOS,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Southern District of Texas
USDC No. 7:17-CV-92

ORDER:

Ruben James Rios, federal prisoner # 89118-379, pled guilty pursuant to a plea agreement to one count of knowingly receiving child pornography. His 28 U.S.C. § 2255 motion challenging this conviction was denied. Rios filed a motion under Federal Rule of Civil Procedure 60 (b)(4), (6), and (d) for relief from the order denying his § 2255 motion. He now seeks a certificate of appealability (COA) to appeal the district court's denial of that motion. Additionally, he seeks to proceed in forma pauperis (IFP) on appeal.

Rios filed his notice of appeal more than 100 days after the district court denied his Rule 60 motion on March 8, 2021, making it untimely. *See* 28 U.S.C. § 2107(b)(1); FED. R. APP. P. 4(a)(1)(B)(i). Thus, this court

lacks jurisdiction over any appeal. *See Hernandez v. Thaler*, 630 F.3d 420, 424 (5th Cir. 2011). As a result, Rios's claims do not deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Accordingly, his motion for a COA is DENIED and his motion to proceed IFP is DENIED AS MOOT.

CORY T. WILSON
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

RUBEN JAMES RIOS,	§	
	§	
Movant,	§	
VS.	§	CIVIL ACTION NO. 7:17-CV-92
	§	
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

ORDER DENYING MOTION TO REOPEN JUDGMENT

I. Factual and Procedural Background

Now before the Court is Movant Ruben James Rios's "Motion to Reopen Judgment Pursuant to the Provisions of Rule 60," through which he seeks relief from this Court's Order adopting the Magistrate Judge's Report and Recommendation ("R&R"), denying Movant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, and dismissing his § 2255 proceeding with prejudice. (Dkt. No. 43; *see* Dkt. No. 39). In 2015, Movant pleaded guilty to one count of knowing receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1), and § 2256, and was sentenced to a 235-month term of imprisonment and a 10-year term of supervised release. *E.g.*, (Dkt. No. 39 at pp. 1-2, 5). Relevant to the present Motion, the sentencing court applied a 2-level distribution enhancement "based on participation in a peer-to-peer or file sharing network without the need for a culpable mental state." (*Id.* at p. 3). Movant appealed his sentence on other grounds, and the Fifth Circuit Court of Appeals affirmed. (*Id.* at p. 5). Movant made no further direct challenges to the sentencing court's final judgment, but in 2017, filed this § 2255 collateral attack on his sentence. (*Id.* at pp. 5-6). Among various other arguments, Movant asserted that the 2-level enhancement for

unknowingly distributing child pornography was based on the false testimony of the government's witness, Agent Richard Ulrich, that Movant was sharing his files, and on an alleged unconstitutional search of his computer. (*Id.* at pp. 7, 15-21). In the R&R, the Magistrate Judge credited Ulrich's testimony over that of Movant's, and determined that the evidence presented "[did] not show that the government presented false evidence or unlawfully viewed files on Movant's private computer; rather, it showed that Movant's efforts [not to share files] were unsuccessful." (*Id.* at p. 19). Therefore, the R&R recommended the dismissal of Movant's false evidence claim, as well as his related claim that counsel was ineffective in failing to move to suppress the alleged unlawful search. *See* (*id.* at pp. 15-21). This Court adopted that recommendation in its Order entered on September 13, 2019, Movant appealed, and the Fifth Circuit dismissed the appeal as untimely on September 4, 2020. (Dkt. Nos. 39, 40, 44). Just days prior to the Fifth Circuit's judgment, on September 1, 2020, Movant filed the present Motion asking for relief from this Court's Order pursuant to Federal Rule of Civil Procedure 60(b)(4) or (b)(6), or in the alternative 60(d). (Dkt. No. 43). Movant seeks this relief on the asserted grounds that he was deprived of the opportunity to rebut Ulrich's testimony with evidence consisting chiefly of "production of my forensic reports" and provision of "my own expert [to] examine my computer,"[1] and that his § 2255 counsel and the Court perpetuated the harm by failing to notify Movant of the R&R and Order adopting it in time for Movant to object to and appeal the adverse rulings. (*Id.*). The Court requested, and received, briefing from Respondent on these arguments. (Dkt. Nos. 45, 51). Even crediting Respondent's concession that the Motion is one that "attacks the integrity of the proceedings," not a successive § 2555

[1] Movant also complains that he was not given the opportunity to amend his pleading to include information derived from the requested rebuttal evidence, which complaint is subsumed into the argument that Movant's inability to obtain this evidence justifies relief. *See* (Dkt. No. 43 at pp. 3, 5-6).

motion over which the Court lacks jurisdiction,[2] and even assuming that Movant sought Rule 60(b) relief within a "reasonable time,"[3] the Court finds that the Motion fails on its merits for the following reasons.

II. Rule 60(b)

1. Overview of Applicable Law

Movant appeals to two of the six enumerated grounds for relief set forth in Rule 60(b), which provides, in relevant part, as follows:

> **(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> ...
>
> (4) the judgment is void; [or]
>
> ...
>
> (6) any other reason that justifies relief.

FED. R. CIV. P. 60(b)(4), (6).

A void judgment, within the meaning of Rule 60(b)(4), is "one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010). "The list of such infirmities is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule." *Id.* "A judgment is not void, for example, simply because it is or may have been erroneous," nor may Rule 60(b)(4) serve as a substitute for a timely appeal. *Id.* at 270-71 (quoting *Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir. 1995)) (internal quotations omitted). "Instead,

---

[2] (Dkt. No. 51 at p. 14); *see United States v. Nkuku*, 602 F. App'x 183, 185-86 (5th Cir. 2015).

[3] "A motion under Rule 60(b) must be made within a reasonable time" unless the movant can show good cause for the delay, "and for reasons (1), (2), and (3) no more than a year after the entry of judgment or order[.]" FED. R. CIV. P. 60(c)(1); *e.g.*, *In re Edwards*, 865 F.3d 197, 208 (5th Cir. 2017).

Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Id.*

"Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses." *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 642 (5th Cir. 2005) (quoting *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir.1992)) (internal quotations omitted). Relief under Rule 60(b)(6) "is mutually exclusive from relief available under sections (1)-(5)," and may be granted "only if extraordinary circumstances are present." *Hesling*, 396 F.3d at 642-43 (quoting *American Totalisator Co., Inc. v. Fair Grounds Corp.*, 3 F.3d 810, 815 (5th Cir. 1993)).

2. Analysis

As best as the Court can discern, Movant argues that the asserted deprivations of requested evidence and timely notice of the R&R and Order adopting it constitute violations of due process sufficient to void the judgment under Rule 60(b)(4), or "extraordinary circumstances" justifying relief under Rule 60(b)(6). *See* (Dkt. No. 43). Relevant to Movant's evidentiary complaint, the Court must begin with the premise that "[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *United States v. Fields*, 761 F.3d 443, 478 (5th Cir. 2014), as revised (Sept. 2, 2014) (quoting *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)); *see* (Dkt. No. 51 at p. 20). Rather, a § 2255 movant may secure discovery only for "good cause" shown. *Fields*, 761 F.3d at 478. A movant demonstrates good cause "where specific allegations before the court show reason to believe that [he] may, if the facts are fully developed, be able to demonstrate that he is...entitled to relief." *Id.* (quoting *Bracy*, 520 U.S. at 908–09). "Fishing expeditions" are not authorized.

Id.

As Respondent points out, the Magistrate Judge appointed counsel to represent Movant in his § 2255 proceeding, and over the course of the next several months, held a series of status conferences addressing the need for and production of discovery. (Dkt. No. 51 at p. 8; *see* Dkt. No. 25; 02/20/2019, 03/11/2019, 03/22/2019, 04/08/2019, & 04/24/2019 Minute Entries). Ultimately, Movant's attorney obtained production of the search warrant executed on Movant's residence, audio recordings of Movant's statements, and certain other government reports, and a limited evidentiary hearing at which the Magistrate Judge considered the live testimony of Ulrich and another investigative agent, Movant, and Movant's trial attorney, and the stipulated, proffered testimony of the government's prosecuting attorney. (Dkt. No. 51 at pp. 8-9; *see* Dkt. No. 37; 05/30/2019 Minute Entry; Dkt. No. 38 at pp. 1, 6). Movant nonetheless complains that he was deprived of additional evidence that would have aided him in showing that Ulrich testified falsely that Movant was sharing files. *See* (Dkt. No. 43).

The allegations on which Movant's evidentiary complaint relies consist of his belief that, since Movant took affirmative steps not to share files, "the most likely way that [Ulrich] obtained my IP address was to distribute the child porn himself and troll for a recipient," and that access to Movant's computer and an expert would have allowed to Movant to support this belief. *E.g.*, (Dkt. No. 43 at p. 2). The R&R reveals the Magistrate Judge's careful consideration of Movant's theory for why he could not have shared files, and of Ulrich's controverting testimony that the steps taken by Movant could not have disabled file sharing. *See* (Dkt. No. 38 at pp. 15-19). In essence, the Motion now before this Court targets the Magistrate Judge's apparent failure to find "reason to believe" that additional discovery was needed to resolve the competing testimony, but any such determination fell within the Judge's sound discretion. *See Fields*, 761 F.3d at 478

(court's decision regarding availability of discovery in § 2255 proceeding is committed to its sound discretion). Movant was not deprived of the opportunity to be heard merely because the Magistrate Judge made a discretionary determination and credibility findings adverse to him, nor does any such determination constitute extraordinary circumstances justifying relief from the judgment.

Movant's next complaint that he did not receive timely notice of the R&R and Order adopting it fares no better, first because the Court has only Movant's bare assertion of untimely receipt, and the docket entries for these filings denote the Clerk of Court's notification to the parties. *See* (Dkt. Nos. 38, 39). Even if notification was to Movant's § 2255 counsel alone, one represented by counsel is generally deemed bound by notice to his attorney. *Richardson v. Cain*, 2011 WL 1328898, at *3 (E.D. La. Apr. 5, 2011) (quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)); *see* (Dkt. No. 51 at pp. 19-20). In a series of allegations that may be viewed as an attempt to circumvent the general rule, Movant claims that in November 2019, his mother spoke with Movant's attorney, who informed her that "he did not want to take my case but the Court made him take it." (Dkt. No. 43 at p. 1). Movant makes no mention of whether his mother and counsel also discussed the adverse rulings that, by then, had already been issued. Instead, he claims that he learned of the issuance of the R&R and Order adopting it "months after the judgment was issued," when he called his attorney's office and spoke with his attorney's secretary. (*Id.*). Even crediting these allegations and their implications—namely, that notice to counsel was effectively no notice at all—Movant fails to identify any basis for objecting to the R&R "that would suggest he has been prejudiced by [his attorney's] alleged negligence" in failing to timely inform him of the adverse rulings. *Richardson*, 2011 WL 1328898, at *3; *see*

(Dkt. No. 51 at p. 19).[4] Also, the Fifth Circuit has interpreted Rule 77(d)'s instruction that "lack of notice of the entry [of a judgment] does not...relieve—or authorize the court to relieve—a party for failing to appeal within the time allowed," FED. R. CIV. P. 77(d)(2), to mean that a party seeking relief from a judgment under Rule 60(b) "must show more than mere reliance on the clerk to give notice[.]" *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1204 (5th Cir. 1993) (quoting *Wilson v. Atwood Grp.*, 725 F.2d 255, 258 (5th Cir.) (en banc), *cert. dismissed*, 468 U.S. 1222 (1984)). "Implicit in this rule is the notion that parties have a duty to inquire periodically into the status of their litigation." *Id.* at 1201-02 (citing *Jones v. Estelle*, 693 F.2d 547, 549 (5th Cir.1982) (per curiam), *cert. denied*, 460 U.S. 1072, (1983)); *see* (Dkt. No. 51 at pp. 23-24). Here, although the docket reflects inquires by Movant during the life of the § 2255 proceeding, it reflects no such inquires at any time after the evidentiary hearing took place. (Dkt. No. 51 at p. 23; *see* Dkt. Nos. 14, 16, 18; 12/20/18 Docket Entry). Movant's Rule 60(b) Motion, filed only days before the Fifth Circuit rejected his appeal as untimely, clearly represents an attempt to use Rule 60(b) as "an end run to effect an appeal outside the specified time limits," and must be rejected. *Pryor v. U.S. Postal Service*, 769 F.2d 281, 288 (5th Cir. 1985) (observing that to hold otherwise, time limits for appeal "become essentially meaningless"); *see also Latham*, 987 F.2d at 1203 (beginning its analysis of district court's Rule 60(b) denial "with the principle, recognized time and again in our case law, that a Rule 60(b) motion may not be used as a substitute for a timely appeal"); (Dkt. No. 51 at pp. 23-24). For all of these reasons, the asserted lack of notice uncovers neither a fundamental infirmity nor extraordinary circumstances within the meaning of Rule 60(b).

In an argument related to his evidentiary and notice complaints, Movant also complains

[4] Assuming any objections would have consisted of Movant's complaints about the deprivation of evidence and his attorney's "abandonment" and "conflict of interest," they would have failed for the reasons discussed herein.

of his attorney's "abandonment" and "conflict of interest," as evinced by counsel's failure to secure the requested evidence and timely notify Movant of the R&R and Order adopting it, and by counsel's alleged conversation with his mother. (Dkt. No. 43 at p. 1). Movant asserts that "[i]t is in part through appointing...disinterested counsel that the government was able to sidestep the production of my forensic reports and sidestep me having my own expert examine my computer," and to secure a judgment free from objection or appeal. (*Id.*). This complaint also fails to warrant relief under Rule 60(b), for the reasons already explained, and more pointedly, because the record casts doubt on its veracity. Subsequent to his appointment, counsel participated in numerous status conferences resulting in the government's production of the search warrant, Movant's recorded statements, and additional government reports in a proceeding in which Movant was "not entitled to discovery as a matter of ordinary course," and both examined and cross-examined witnesses on Movant's behalf at a hearing afforded him as a matter of discretion. (Dkt. No. 51 at p. 18; *see, e.g.*, 04/24/2019 & 05/30/2019 Minute Entries). That his attorney did not obtain other items of discovery to which Movant thought himself entitled, but the Magistrate Judge apparently did not, that counsel allegedly emphasized his "appointed" status to Movant's mother, and that Movant allegedly did not acquire notice of the Court's disposition of the proceeding until a call to his attorney's office "months after the judgment was issued," are not fundamental infirmities or extraordinary circumstances justifying Rule 60(b) relief.

III. Rule 60(d)

Movant alternatively invokes Rule 60(d), which provides in full as follows:

> **(d) Other Powers to Grant Relief.** This rule does not limit a court's power to:
>
> (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

FED. R. CIV. P. 60(d); *see* (Dkt. No. 43 at pp. 1, 5, 7). Movant's resort to this portion of Rule 60 is also unavailing, first because his Motion does not constitute an "independent action" contemplated by subsection (d)(1), nor does it involve the alleged lack of personal notice in a lien enforcement action within the meaning of § 1655. *See* 28 U.S.C. § 1655. The remaining subsection (d)(3) operates as a "saving clause" for out-of-time motions seeking to set aside a judgment for fraud under Rule 60(b)(3), yet Movant filed the Motion within the one-year time limit for Rule 60(b)(3) motions. *See Jackson v. Thaler*, 348 F. App'x 29, 34 (5th Cir. 2009); FED. R. CIV. P. 60(b)(3), (c)(1).[5] Regardless of which standard applies, the Motion fails to show, by clear and convincing evidence, fraud on the part of the government in presenting Ulrich's testimony, nor does Movant succeed in showing the type of "egregious misconduct" sufficient to constitute fraud on the Court. *See Hesling*, 396 F.3d at 641 (party moving for relief under Rule 60(b)(3) has burden to prove, by clear and convincing evidence, that adverse party engaged in fraud that prevented moving party from fully and fairly presenting his case); *Jackson*, 348 F. App'x at 34 (since Rule 60(d)(3) allows court to set aside judgment for fraud "without a strict time bar," standard is "demanding" and "'[o]nly the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute fraud on the court'") (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)).

[5] *See supra* n.3.

IV. Conclusion

For the foregoing reasons, the Court hereby **ORDERS** that the Movant's Rule 60 Motion is **DENIED**.

SO ORDERED this 8th day of March, 2021, at McAllen, Texas.

Randy Crane
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

RUBEN JAMES RIOS	§	
	§	
Movant,	§	**CIVIL ACTION NO. 7:17-CV-00092**
VS.	§	**CRIM ACTION NO. 7:15-CR-00775-1**
	§	
UNITED STATES OF AMERICA	§	
	§	
Respondent.	§	

REPORT AND RECOMMENDATION

Movant Ruben James Rios, a federal prisoner proceeding pro se, initiated this action by filing a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (Civ. Dkt. No. 1). This case was referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636(b).

Movant brings no less than thirteen collateral review claims and sub-claims related to his underlying conviction and sentence for knowing receipt of child pornography. The undersigned held a limited evidentiary hearing at which the parties presented the testimony of four witnesses and proffered the testimony of a fifth witness.

After a careful review of the record and relevant law, the undersigned recommends that Movant's § 2255 motion be **DENIED** and that his claims be **DISMISSED** with prejudice. It is further recommended that a Certificate of Appealability be **DENIED** and that the case be closed.

I. BACKGROUND AND PROCEDURAL HISTORY

On June 23, 2015, Movant was charged with one count of knowing receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A), (b)(1), and § 2256. (Crim. Dkt. No. 8).

On September 3, 2015, Movant pled guilty pursuant to a written plea agreement.[1] (Crim. Dkt. Entry, dated Sept. 3, 2015; Crim. Dkt. No. 20).

The U.S. Probation Office prepared Movant's Presentence Investigation Report ("PSR") according the 2015 United States Sentencing Commission Guidelines Manual ("U.S.S.G."). (Crim. Dkt. No. 25 at 6, ¶ 14). Movant began with a base offense level of 22, pursuant to U.S.S.G. § 2G2.2(a)(2). (*Id.* at ¶ 15). A 2-level increase was applied because some of the movie files downloaded by Movant depicted children under twelve years of age. (*Id.* at ¶ 16). A 4-level increase was applied because 125 of the child pornography movies involved portrayed sadistic or masochistic conduct, or other depictions of violence. (*Id.* at 6-7, ¶ 18). An additional 2-level increase applied because the offense involved the use of a computer or an interactive computer service. (*Id.* at 7, ¶ 19).

The offense involved 147 child pornography movies, or 11,025 images.[2] (Crim. Dkt. No. 25 at 7, ¶ 20). Thus, the offense warranted a 5-level increase.[3] (*Id.*). An additional 2-level increase was applied pursuant to U.S.S.G. § 3A1.1(b)(1) because two movie files depicted two victims who were especially vulnerable because they were under three years of age. (*Id.* at ¶ 21). The PSR advised that a 5-level distribution enhancement was warranted because the offense "involved the distribution for the receipt of child pornography via a peer-to-peer file sharing network." (*Id.* at 6, ¶ 17).

---

[1] Movant seems to suggest that the written plea agreement included a waiver of his right to collateral appeal. It does not. (*See* Crim. Dkt. No. 20).

[2] The Guidelines commentary provides that each movie is considered to be 75 images. *See* U.S.S.G. § 2G2.2 cmt. n.4(B)(ii). 147 movies multiplied by 75 equals 11,025 images.

[3] If the offense involved 600 images or more, a 5-level increase is warranted. U.S.S.G. § 2G2.2(7)(D) (2015).

Movant's counsel filed objections to the PSR. In particular, counsel objected to the 5-level distribution enhancement. (Crim. Dkt. No. 23 at 1-2). At sentencing, the government conceded that the 5-level distribution enhancement was not warranted, but that a 2-level distribution enhancement instead should be applied based on *United States v. Baker*, 742 F.3d 618 (5th Cir. 2014). (Crim. Dkt. No. 51 at 7-8). The 2-level enhancement is based on participation in a peer-to-peer or file sharing network without the need for a culpable mental state. (*Id.*). The Court applied the 2-level distribution enhancement. (*Id.* at 10).

Finally, Movant received the full 3-point reduction for acceptance of responsibility. (*Id.* at 5, 10; Crim. Dkt. No. 25 at 7, ¶ 26). Based on Movant's total offense level of 36 and a criminal history category of I, his recommended sentencing range under the Guidelines was 188 to 235 months. (Crim. Dkt. No. 44 at 1).

Counsel argued for a potential departure in consideration of the 18 U.S.C. § 3553 factors, based on the fact that Movant was not actively responsible for causing harm to the child victims and Movant's diminished capacity and/or mental impairment. (Crim. Dkt. No. 23 at 3-4). The Court rejected counsel's argument, noting that Movant's interest in child pornography is not equivalent to the kind of mental impairment that might warrant a downward departure. (Crim. Dkt. No. 51 at 14).

To support the Court's consideration of particular 18 U.S.C. § 3553 sentencing factors, the government presented witness testimony at sentencing. The government called Agent Richard Ullrich from the Department of Homeland Security to the stand. (Crim. Dkt. No. 51 at 17). Agent Ulrich testified that Movant gave a post-*Miranda* statement in which Movant admitted to receiving and downloading child pornography from the internet. (*Id.*). Movant also admitted to using a software program called "Shareaza" to download child pornography. (*Id.*). The agent testified

that Shareaza is a peer-to-peer file sharing program. (*Id.* at 18). Movant utilized a specific keyword that was associated with child pornography to search for videos on Shareaza. (*Id.* at 19). Agent Ulrich also stated that a Shareaza user has the ability to "preview" a file before downloading it and that Movant admitted to viewing files using the preview function before downloading them. (*Id.* at 21). According to the agent, Movant watched "shock and awe" videos. (*Id.* at 24-25).

Agent Ulrich stated that Movant also used what is called a "[TOR] browser" or "onion router." (Crim. Dkt. No. 51 at 23). A TOR browser is designed to hide or disguise the user's I.P. address and is commonly used by child pornography collectors. (*Id.*). Agent Ulrich testified that Movant admitted to using a TOR browser to "hide his activities of what he was doing on-line." (*Id.* at 23-24).

Based on this testimony, the government emphasized to the District Court that Movant did not "stumble upon" child pornography, but, rather, was an active and experienced collector of child pornography. (*Id.* at 28-29). The prosecution underscored that Movant had taken steps to conceal his identity online and that he sought out extremely graphic videos. (*Id.*). The government also argued that Movant intentionally surrounded himself with children, pointing to the portions of the PSR which stated Movant worked as a substitute teacher and worked for three months as a Child Protective Services agent. (*Id.* at 29-30). The government argued that Movant was a danger to the community and recommended that the Court sentence Movant somewhere in the middle or at the higher end of the Guidelines range. (*Id.*). Defense counsel argued that, although Movant viewed child pornography, he should not be viewed as a future sexual abuser. (*Id.*).

Before imposing the sentence, the District Court explained its reasoning. The Court noted that there were more videos involved "than the Guidelines will ever account [for]" and that some of the videos contained children of extremely young ages. (*Id.* at 42-43). The Court stated that it

was additionally troubled "by two things, in particular": that Movant tried to "keep[ ] [his] identity from law enforcement" through the TOR browser and that he sought out extremely graphic "shock and awe" videos. (*Id.*). Ultimately, the Honorable U.S. District Judge Micaela Alvarez sentenced Movant to a 235-month term of imprisonment and a 10-year term of supervised release. (*Id.* at 44-45). This was the maximum end of the Guidelines range (188 to 235 months), and 5 months shy of the statutory maximum of 240 months. (*Id.*).

On December 24, 2015, Movant appealed his conviction and sentence to the Fifth Circuit Court of Appeals. (Crim. Dkt. No. 36). On appeal, Movant argued that the District Court erred in making certain assumptions about his work history, his inclination to commit sexual assault, and the extent of his depression. (Crim. Dkt. No. 54 at 1). The Fifth Circuit rejected this argument, because although the District Court did note that Movant held job positions involving children and that some studies have shown that child pornography is associated with child abuse, the District Court also stated that Movant's sentence was not based on "any past or future physical contact with children." (*Id.* at 1-2). The District Court emphasized that Movant's sentence was based on the graphic nature of the videos, the young ages of the children, that Movant actively sought out these videos, and that Movant attempted to conceal his identity. (*Id.*). The Fifth Circuit found that the comments related to Movant's work history, inclination to commit sexual assault, or his depression were not shown to be material to the length of Movant's sentence. (*Id.*).

The Fifth Circuit also rejected Movant's argument that the District Court gave weight to an irrelevant or improper factor. (*Id.*). The Fifth Circuit characterized Movant's argument as little more than a "disagreement with the balance that the district court struck," declining to reweigh the 18 U.S.C. § 3553(a) factors. (*Id.*). The Fifth Circuit affirmed Movant's conviction and sentence on September 20, 2016. (Crim. Dkt. No. 54). Movant did not file a motion for rehearing or seek

a writ of certiorari with the United States Supreme Court.

On March 14, 2017, Movant filed the instant § 2255 motion.[4] (Civ. Dkt. No. 1).

II. SUMMARY OF THE CLAIMS

Movant supports his assertions with a highly detailed, sworn declaration (Civ. Dkt. No. 2) and memorandum (Civ. Dkt. No. 4). On November 8, 2017, the government filed a memorandum in response, arguing that the record conclusively refutes all of Movant's claims. (Civ. Dkt. No. 11).

The record was expanded to include an audio recording of Movant's interview with Agent Reneau and Agent Ulrich.[5]

A limited evidentiary hearing was held on May 30, 2019.[6] The parties presented the testimony of four witnesses: Movant, Agent Richard Ulrich, Agent Jean-Paul Reneau, and Movant's trial counsel, Mr. Eric Jarvis. The parties stipulated to the proffered testimony of AUSA Alex Benavides.

At the evidentiary hearing, Movant, with the assistance of appointed counsel Ricardo Salinas, announced that he would waive his *Brady* claim and parts of his false evidence claim related to the vulnerable victim enhancement[7] and Agent Ulrich's testimony concerning the "shock

---

[4] "[P]ro se prisoners' filings are governed by the mailbox rule. Thus, they are deemed 'filed as soon as the pleadings have been deposited into the prison mail system.' " *Medley v. Thaler*, 660 F.3d 833, 835 (5th Cir. 2011). This date is taken from Movant's motion, where he states under the penalty of perjury that his motion was placed in the prison mail system on March 14, 2017. (Civ. Dkt. No. 1 at 3). Movant's motion is timely under § 2255(f)(1).

[5] Citations to the recorded interview (hereinafter "Interview File 1" or "Interview File 2") are given based on the run time of the recording, starting at 0:00:00.

[6] Citations to the audio recording of the evidentiary hearing (hereinafter "Evidentiary Hearing) are given based on the time of day, ex. 2:30 P.M.

[7] At sentencing, Agent Ulrich testified that a Shareaza user has the ability to "preview" a file before downloading it. (Crim. Dkt. No. 51 at 21). Once Movant would "see what he was specifically looking for through the preview function, he would download that specific video and file." (*Id.*). Movant was assessed a 2-level vulnerable victim enhancement because two videos depicted victims under three years of age.

and awe" videos.[8]

Excluding the claims that have been waived, the undersigned interprets Movant's pleadings to contain the following claims:

1. The vulnerable victim enhancement is in conflict with clarifying amendment 801.
2. The vulnerable victim enhancement is unconstitutionally vague, and the rule of lenity should have applied.
3. The application of the vulnerable victim enhancement is a violation of due process because the victims may no longer be children at the time of receipt.
4. Movant's sentence was improperly enhanced, in violation of *Apprendi*.
5. Counsel ineffectively presented an "inflammatory paper" to the Court.
6. (a) The government provided false information that Movant was sharing his files, and (b) counsel failed to pursue a suppression motion based on the government's unlawful search of Movant's computer.
7. The government provided false information regarding the TOR browser.
8. Counsel failed to move to suppress Movant's post-arrest statements and flash drive.
9. Counsel failed to prepare for and failed to raise appropriate objections at sentencing.
10. Counsel failed to raise the above claims on appeal.

III. APPLICABLE LAW AND ANALYSIS

A. Section 2255 Standard

Once a conviction has become final, a motion under 28 U.S.C. § 2255 is the primary means of collateral attack on a federal sentence. *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000) (quotation omitted). There are four cognizable grounds upon which a federal prisoner can bring a

---

Movant asserted that he lacked actual knowledge of the vulnerability of the victims, claiming that he never saw a preview that he knew to depict an infant or toddler. (Civ. Dkt. No. 2 at 8). Movant initially argued that Agent Ulrich's testimony was false because Shareaza "sometimes provided a preview of a movie or video, but not always." (*Id.*).

[8] Agent Ulrich testified that Movant "had an affiction towards what we refer to [as] shock and awe videos," such as "murder videos, be-headings, just very graphic videos." (Crim. Dkt. No. 51 at 24). The agent testified that these videos led Movant to watch child pornography because "it kind of made him curious as to what else was out there." (*Id.* at 24-25). Movant argued that Agent Ulrich's statement was "passed off as my statement" and that this testimony was used to "justify [his] severe sentence." (Civ. Dkt. No. 2 at 2). The recording clarifies that the agent made a statement summarizing the agent's understanding of why Movant was interested in watching child pornography, and Movant assented to that statement. (Interview File 1 at 0:00:44 - 0:00:45).

§ 2255 motion to vacate, set aside, or correct a sentence: (1) constitutional issues, (2) challenges to the district court's jurisdiction to impose the sentence, (3) challenges to the length of a sentence in excess of the statutory maximum, and (4) claims that the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a); *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996). "Relief under 28 U.S.C.A. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). Movant has the burden of establishing his claims by a preponderance of the evidence. *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980).

B. Ineffective Assistance of Counsel Standard

Allegations of ineffective assistance of counsel are analyzed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on an ineffective-assistance claim, a defendant must establish (1) "that counsel's performance was deficient" and (2) "that the deficient performance prejudiced the defense." *Id.* at 687.

To establish deficient performance a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. "Judicial scrutiny of counsel's performance must be highly deferential," without the "distorting effects of hindsight," and counsel is entitled to "a strong presumption that the performance falls within the wide range of reasonable professional assistance." *Id.* at 689. The burden is on the defendant to overcome this presumption. *Id.* To demonstrate prejudice, 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.* at 687.

To establish prejudice in connection with a guilty plea, a defendant bears the burden of demonstrating "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). A defendant must present more than post hoc statements that he would have chosen to proceed to trial; he must show that going to trial would have been objectively reasonable. *United States v. Kayode*, 777 F.3d 719, 725 (5th Cir. 2014). In other words, a defendant must show that going to trial would have given him a reasonable probability of a more favorable result. *See United States v. Batamula*, 823 F.3d 237, 540 (5th Cir. 2016).

Prejudice in the sentencing context requires showing that the sentence was increased due to counsel's error. *See Glover v. United States*, 531 U.S. 198, 203–04 (2001) (explaining that any amount of jail time has Sixth Amendment significance); *United States v. Grammas*, 376 F.3d 433, 438 (5th Cir. 2004).

If the movant fails to meet one prong of the *Strickland* test, it is not necessary to analyze the other. *Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir. 1994) ("A court need not address both components of the inquiry if the defendant makes an insufficient showing on one."); *see also Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997) ("Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim.").

C. Analysis of Claims

To address a preliminary matter raised by the government at a status conference, the government has argued Movant cannot bring any § 2255 claims because he pled guilty, and a valid guilty plea waives non-jurisdictional defects. This is true with respect to non-jurisdictional defects that "occurred prior to the entry of the guilty plea." *Class v. United States*, 138 S. Ct. 798, 804–05 (2018). "[A] guilty plea represents a break in the chain of events which has preceded it in the

criminal process. . . . [The defendant] may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *United States v. Cothran*, 302 F.3d 279, 285–86 (5th Cir. 2002) ("A plea of guilty admits all the elements of a formal criminal charge and waives all non-jurisdictional defects in the proceedings leading to conviction."). A guilty plea does not prospectively waive defects that have yet to occur, such as error at sentencing.

Additionally, while a valid guilty plea waives the right to trial and other accompanying guarantees, it does not waive constitutional "privileges which exist beyond the confines of the trial." *Class*, 138 S. Ct. at 805. A guilty plea also does not bar ineffective assistance claims relating to the validity of the guilty plea.[9]

1. *Amendment 801*

Movant contends that the vulnerable victim enhancement conflicts with Amendment 801 to the Guidelines. (Civ. Dkt. No. 1 at 2). Movant argues that the application of both the vulnerable victim enhancement and the age-based enhancement was impermissible "double counting."[10] (Civ. Dkt. No. 4 at 11-12). Unfortunately for Movant, a challenge to the Court's application of the sentencing guidelines, by itself, is not cognizable on habeas review. *United States v. Walker*, 68 F.3d 931, 934 (5th Cir. 1995) ("A district court's calculation under or application of the sentencing guidelines standing alone is not the type of error cognizable under section 2255.").

---

[9] Movant raises, for example, an ineffective assistance of counsel claim surrounding a Fourth Amendment violation. A valid guilty plea will eliminate objections to the Fourth Amendment violation *itself*. *Cothran*, 302 F.3d at 285–86. A guilty plea does not bar Movant from asserting that counsel performed ineffectively by advising him to plead guilty without first moving to suppress the allegedly unlawfully obtained evidence. *See, e.g., Premo v. Moore*, 562 U.S. 115, 123 (2011) ("The question becomes whether Moore's counsel provided ineffective assistance by failing to seek suppression of Moore's confession to police before advising Moore regarding the plea.").

[10] Amendment 801 was issued in part to address this type of "double counting."

Even if construed as an ineffectiveness claim, Movant's argument is meritless. Amendment 801 to the Guidelines became effective November 1, 2016. *See* U.S.S.G., Suppl. to App. C, Amendment 801. Movant was sentenced on December 18, 2015, long before Amendment 801 went into effect. Counsel could not have possibly raised an argument based on Amendment 801. Counsel is also not obligated to anticipate changes in the law. *See United States v. Fields*, 565 F.3d 290, 294-95 (5th Cir. 2009). There can be no deficient performance in this situation.

It is further noted that Movant's claim cannot be construed as a motion made pursuant to 18 U.S.C. § 3582(c), because the Sentencing Commission has not identified Amendment 801 as an amendment that applies retroactively. U.S.S.G. § 1B1.10(d) (2018); *see United States v. Childs*, No. 3:10-CR-075-O-01, 2017 WL 3263458, at *1 (N.D. Tex. Apr. 3, 2017).

Lastly, as noted by Respondent, there was no "double counting." In *Jenkins*, the Fifth Circuit distinguished between vulnerability based solely on age and other kinds of vulnerability that may be *related* to age. *United States v. Jenkins*, 712 F.3d 209, 213 (5th Cir. 2013) (rejecting argument that vulnerable victim enhancement can never be applied to account for a vulnerability that is related to age); *see United States v. Ramos*, 739 F.3d 250, 252 (5th Cir. 2014) ("For example, children may be especially vulnerable as compared to other children because they are unable to walk or resist, whether that inability is due to an age-related reason like infancy or another reason like paralysis."). In Movant's case, the cited reason for the vulnerable victim enhancement was that children under the age of three are "unable to resist or object to the production of child pornography." (Crim. Dkt. No. 25 at 7). In other words, infants and toddlers are especially vulnerable because they cannot "resist or object." Although this fact is related to their infancy, it is distinguishable from an enhancement based on age.

The undersigned recommends that this claim be dismissed.

2. *Unconstitutionally Vague*

Movant argues that the vulnerable victim enhancement is unconstitutionally vague and should therefore be subject to the rule of lenity.[11] (Civ. Dkt. No. 4 at 12). Movant's argument is meritless because the Guidelines are not subject to constitutional void-for-vagueness challenges. *Beckles v. United States*, 137 S. Ct. 886, 895 (2017).

The undersigned recommends that this claim be dismissed.

3. *Vulnerable Victims No Longer Children*

Movant argues that the vulnerable victim enhancement should not apply to him because while the victims were of a certain age at the time the pornography was created, the victims would age between the creation of the videos and the point at which he received the files. (Civ. Dkt. No. 4 at 19-20). He claims that it cannot be "reliably said" that any one victim is still a child. (*Id.*). Movant's argument is nonsensical; according to his view, he cannot be punished for receiving child pornography because at some point all children will grow to be adults. Movant does not show there was, as he claims, a due process violation. Moreover, this is not the type of argument that should be brought on a § 2255 motion because, again, a disagreement with the application of the Sentencing Guidelines could have been brought on direct appeal.

The undersigned recommends that this claim be dismissed.

4. *Apprendi Claim*

Movant argues his sentence was improperly enhanced, in violation of *Apprendi*, based on facts that were not charged in the indictment, not found by a jury, or admitted to by him. (Civ. Dkt. No. 1 at 3).

---

[11] Movant also argues that the District Court failed to make specific factual findings on the record. (Civ. Dkt. No. 4 at 12). It is unclear if Movant is attempting to raise a distinct claim. In any case, the undersigned notes that a sentencing court is allowed to make implicit factual findings by adopting the PSR. *United States v. Puig-Infante*, 19 F.3d 929, 943 (5th Cir. 1994).

An increase to a defendant's sentence based on sentencing factors, like the ones Movant received under the Sentencing Guidelines, do not violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* only concerns increases in the statutory range of penalties, requiring that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury [or admitted to by the defendant], and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Enhancements under the Sentencing Guidelines affect the *advisory* sentencing range. Because there were no sentencing enhancements that changed the statutory penalty range, there can be no *Apprendi* violation.[12]

Furthermore, contrary to Movant's assertions, the indictment need not charge these sentencing factors. *See Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) ("An indictment . . . need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime."). Finally, Movant's assertion that his sentencing enhancements were based on insufficient evidence in violation of *Apprendi* is taken to mean that Movant believes the facts supporting his sentencing enhancements need be proven beyond a reasonable doubt. This is not true. Unlike the primary offense conduct, "findings of fact for sentencing purposes need meet only the lower standard of 'preponderance of evidence.' " *United States v. Hull*, 160 F.3d 265, 269 (5th Cir. 1998); *see also Alleyne v. United States*, 570 U.S. 99, 116-17 (2013) (distinguishing enhancements which increase mandatory minimums from judicial fact finding for sentencing purposes); *United States v. Hinojosa*, 749 F.3d 407, 412 (5th Cir. 2014) ("Guideline ranges based on relevant conduct and other factors will often extend far above a statutory minimum. . . . When that is the case, nothing in *Alleyne*, *Apprendi*, *Booker* or other authority provides that the

[12] Movant's sentence is within the 20-year statutory maximum. *See* 18 U.S.C. § 2252A(b)(1); (Crim. Dkt. No. 25 at 11, ¶ 53).

discretionary range of the Guidelines triggers . . . the requirement of jury fact-finding."). There is no *Apprendi* violation.

The undersigned recommends that this claim be dismissed.

5. *Inflammatory Paper*

Movant asserts that trial counsel ineffectively provided the Court "with a document that suggested that viewers of child pornography also molest children" which "inflam[ed] the judge." (Civ. Dkt. No. 4 at 29).

Defense counsel provided two articles to the Court to take into consideration at sentencing. (Crim. Dkt. No. 51 at 5-6). These articles were meant to support counsel's argument that the Guidelines were excessive as applied to child pornography cases, because many of the enhancements that apply are already contemplated in the offense of downloading child pornography itself. (*Id.* at 11-12).

After the government presented its § 3553 argument at sentencing, counsel responded by arguing that the government's position rested on the assumption that the "majority of child pornography offenders are potential sexual offenders," but that this presumption was not supported by scientific literature. (*Id.* at 30). The Court responded by noting that one of the articles provided by defense counsel "says quite the opposite," in that a significant percentage of child pornography offenders, who were considered to be "only on-line offenders," later admitted to having undetected, inappropriate sexual contact with children. (*Id.* at 31). The Court also noted that it was not critical for sentencing purposes to determine whether Movant had engaged or might engage in inappropriate physical contact sometime in the future. (*Id.* at 40). The Court did note, rather, that it was somewhat concerned by the fact that Movant chose to take on teaching positions involving school age children. (*Id.* at 40-41).

Movant cannot demonstrate prejudice because the Court expressed that it was not basing its sentence on whether it believed Movant had a propensity to engage in inappropriate physical contact with children. As addressed by the Fifth Circuit Court of Appeals, the district judge "iterated that [Movant's] sentence was not based on any past or future physical contact with children." (Crim. Dkt. No. 54 at 1). As such, even if counsel inadvertently supplied the Court with authority which supported a connection between viewing child pornography and engaging in inappropriate sexual contact, Movant is not able to demonstrate that providing the Court with this article prejudiced him. The District Court made clear that Movant's other actions—choosing to take on teaching positions, the graphic nature of the videos, the young ages of the children in the videos, the large number of videos, and concealing his identity—contributed to Movant's sentence at the high end of the Guidelines. (Crim. Dkt. No. 51 at 41-43).

This claim should be dismissed.

6. *File Sharing Claims*

Movant contends that Agent Ulrich testified falsely at sentencing and that trial counsel was ineffective for failing to file a suppression motion based on an impermissible Fourth Amendment search of his computer. Because these claims rely on the same set of facts, the undersigned will address them together in this section.

On February 8, 2015, Agent Ulrich conducted a search of the Gnutella network and discovered a user that possessed numerous files whose titles and descriptions suggested the files contained child pornography. (Crim. Dkt. No. 90-3 at 16-17 ("Warrant Affidavit")). The "SHA1" value of the files were compared to known files already verified to contain child pornography.[13]

[13] The network uses a file encryption method called "Secure Hash Algorithm Version 1" or "SHA1." Warrant Affidavit at 14-16. The SHA1 encryption process results in a "digital signature," and "two files that share the same digital signature are identical with a precision that greatly exceeds 99.999 percent

Id. A few days later, Agent Ulrich observed and selected a certain file from the user for downloading. *Id.* The user's IP address was IP 67.10.79.64. *Id.* The target file was downloaded and verified to be child pornography. *Id.* The "shared folder" provided by the user at IP address IP 67.10.79.64 was located, browsed, and found to contain approximately 300 files with titles suggestive of child pornography. *Id.*

In his memorandum, Movant describes in detail how he used the Shareaza software, averring that he "took affirmative steps to prevent file sharing" while still being able to download from the program. (Civ. Dkt. No. 2 at 3). Movant claims that when he installed the program, he deleted the three default folders from the Shareaza Installation Wizard screen and therefore did not create a "shared" folder. (*Id.* at 1). He used his computer's regular "downloads" folder to download the files to. (*Id.*). Movant also notes that his downloads folder was not set for file sharing through Shareaza, and he did not set it to be "browsable" at any point. (*Id.*). Once downloaded, Movant transferred the files onto his thumb drive and then deleted the original downloaded files from his computer to ensure that they could not be shared. (*Id.* at 3). Movant states in his affidavit that Shareaza allows users to "freeload," which "means there is no requirement for me to distribute or share in order to receive . . . from any user who is file sharing." (Civ. Dkt. No. 4 at 32).

Movant received a 2-point enhancement for unknowingly sharing child pornography. Movant does not focus on whether he intentionally or unintentionally shared child pornography; rather, Movant contends that, because of the affirmative steps he took, it was not possible that he was sharing child pornography and that *no* sharing enhancement should have applied. Movant believes that Agent Ulrich's testimony at sentencing was necessarily false and that he should not

---

certainty." *Id.* Thus, by comparing the SHA1 digital signatures of a target file to known digital signatures, the target file can be identified. *Id.*

have received the 2-level distribution enhancement. Movant states that Agent Ulrich's "template" description of the Shareaza software would probably apply in "almost every peer-to-peer investigation" case; however, the testimony was incorrect because it not tailored to a case like his, in which the user had taken steps to prevent file sharing. (Civ. Dkt. No. 2 at 7; Civ. Dkt. No. 4 at 4).

Additionally, Movant believes that the government must have conducted a search of his personal computer in violation of the Fourth Amendment because his files were not being shared. Movant reasons that it should have been impossible to view the private files on his computer without some unconstitutional intrusion. Movant contends his counsel should have filed a suppression motion on this basis.

These claims fail because Movant was, in fact, sharing his files.

Movant's testimony at the evidentiary hearing was less than credible. Movant's testimony appeared to be based on no more than his own personal experience using computers and critical assumptions he made as to how the Shareza program operated. Movant testified that, because his personal "downloads" folder is located on his computer and because he never designated that folder for sharing, the Shareaza program could not have been sharing files from that folder. Essentially, Movant believed that the program required him to affirmatively opt in to share the files kept in his "downloads" folder. Movant offered no support for this assumption. Movant did not testify that he had any specialized training or knowledge.

Agent Ulrich's testimony was based on his highly specialized training, experience in investigating child pornography offenses, and his examination of Movant's computer. (Evidentiary Hearing at 10:58 – 11:01 A.M.). The undersigned finds Agent Ulrich's testimony credible. Agent Ulrich testified that, although there are ways to prevent a peer-to-peer program

from sharing, the steps taken by Movant would not have disabled sharing. By deleting the default folders and re-directing the program to his computer's personal "downloads" folder, Movant only changed the location of the downloaded files, but did not disable file sharing.

Additionally, no affirmative steps need be taken to share files. Agent Ulrich testified that peer-to-peer programs have a user license agreement which states that the user must agree to share his files. Sharing is the default setting. Even if a user changes his settings so that the program does not share files, certain events, such as a program update, can easily cause the program to revert back to its default settings.

Importantly, Agent Ulrich testified that the program he used to investigate child pornography, a version of Shareaza modified for law enforcement, could only have detected Movant's files if the files were available for sharing. While the Shareaza program used by law enforcement is modified in certain ways, the law enforcement program has no special ability to find and view files that are not being shared on the peer-to-peer network. Law enforcement can only find and download files that are available to the public. When Agent Ulrich performed a search for child pornography on February 8, 2015, a child pornography file associated with Movant's IP address appeared because that file was already being shared.[14]

Movant may have sincerely believed that he could prevent sharing by routing the files to his "downloads" folder and then transferring the files to his thumb drive.[15] The testimony

[14] In his pleadings, Movant repeatedly focuses on his belief that it should have been impossible to download a file from his computer while his computer was downloading the file, or what Movant calls intercepting his "download stream." (*See, e.g.*, Civ. Dkt. No. 2 at 1; Civ. Dkt. No. 4 at 38). As explained by Agent Ulrich at the evidentiary hearing, once a computer downloads a portion of a file past a certain threshold, it now possesses a sharable piece of the file. Because peer-to-peer programs fundamentally operate by grabbing bits and pieces of a file from different users to download files faster, it is possible that Movant's computer began offering to share its portion of the file even while his computer was in the processes of downloading the full file itself.

[15] During Movant's interview with HSI agents, an agent asked if Movant saves the movies he downloads to his computer. (Interview File 1 at 0:37:00-0:39:00). Movant replied that he "thinks" the movies are

presented at the evidentiary hearing does not show that the government presented false evidence or unlawfully viewed files on Movant's private computer; rather, it showed that Movant's efforts were unsuccessful. In order to successfully bring a false-evidence claim, the first requirement is that the defendant must show the presented evidence was actually false. *See Devoe v. Davis*, 717 F. App'x 419, 426 (5th Cir. 2018); *see Giglio v. United States*, 405 U.S. 150, 153 (1972). Movant fails this first prong.

Counsel did not render ineffective assistance for failing to pursue a suppression motion because there was no unlawful Fourth Amendment search. A "reasonable expectation of privacy only exists where the person has exhibited an actual expectation of privacy that society accepts as reasonable." *Katz v. United States*, 389 U.S. 347, 354 (1967). "[T]he question of whether a defendant has a reasonable expectation of privacy is a two-fold inquiry: (1) whether the defendant is able to establish an actual, subjective expectation of privacy with respect to the place being search or the items being seized, and (2) whether that expectation of privacy is one which society would recognize as reasonable." *United States v. Gomez*, 276 F.3d 694, 697 (5th Cir. 2001).

Courts have recognized that a legitimate, objectively reasonable expectation of privacy exists in one's personal computer. *See United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) ("Individuals generally possess a reasonable expectation of privacy in their home computers."); *United States v. Buckner*, 473 F.3d 551, 554 n. 2 (4th Cir. 2007) (recognizing a reasonable

---

deleted. (*Id.*). The agents inquired if the movies are left in Movant's shared folder. (*Id.*). Movant responds, "No, not the shared folder. I send them to the trash can and delete them," and that, "I view them and then I delete them." (*Id.*). Movant stated that it would take about an hour for the peer-to-peer network to download a five-minute video to his computer. (*Id.* at 0:46:45-0:53:00). The agents asked Movant if he understood that he was sharing his files. (*Id.*). Movant stated that he knew how a peer-to-peer network worked, but he thought the "whole file" needed to be downloaded first before it could be shared with others. (*Id.* at 0:53:00-5:55:00). Movant also stated that when he installed the program, "it gives you the option to do the specific folder, but I deleted those three folders and so all the stuff just goes to the download folder, and I don't think that anyone can access that online." (*Id.* at 0:57:10-0:58:00).

expectation of privacy in password-protected computer files); *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007). When using software designed for file-sharing, however, one loses an objectively reasonable expectation of privacy in the shared files. A "user of file-sharing software has no reasonable expectation of privacy in his publicly shared files because it is not an expectation of privacy that society is willing to recognize." *United States v. Dodson*, 960 F. Supp. 2d 689, 695 (W.D. Tex. 2013); *United States v. Samples*, No. 3–08–CR–12, 2011 WL 4907315, at *5 (N.D. Tex. Sept. 15, 2011) ("Counsel had no basis for challenging the use of forensic software to download files from a peer-to-peer network because a user of file-sharing software has no reasonable expectation of privacy in his public files."); *United States v. Conner*, 521 F. App'x 493, 498 (6th Cir. 2013); *United States v. Perrine*, 518 F.3d 1196, 1205 (10th Cir. 2008).

Although Movant had a subjective expectation of privacy because he intended to avoid sharing his files, he has not shown that he created an *objectively* reasonable expectation of privacy. There is no Fourth Amendment violation in cases where the user has failed to disable sharing due to his own mistake or from some malfunction. *See United States v. Borowy*, 595 F.3d 1045, 1048 (9th Cir. 2010) (defendant's "ineffectual effort" to prevent the software from sharing his files did not create an objectively reasonable expectation of privacy); *United States v. King*, 509 F.3d 1338, 1341–42 (11th Cir. 2007) (defendant sought to protect his files through security settings, but unknowingly exposed them to the public); *United States v. Dennis*, No. 3:13-CR-10-TCB, 2014 WL 1908734, at *7-8 (N.D. Ga. May 12, 2014) (the fact that defendant clicked "no" when program asked if he wanted to share files did not create objective expectation of privacy because files were still being shared). Movant has not demonstrated that trial counsel had a meritorious basis to file a suppression motion. Counsel's performance was not deficient, and Movant was not prejudiced.

The undersigned recommends that Movant's false evidence and ineffective assistance claims be dismissed.

7. *Motion to Suppress Interview Statements*

Movant argues that his statements made to HSI agents were taken in violation of *Miranda*, were involuntary, and were taken in violation of his Fifth Amendment right to counsel. Movant argues his attorney was ineffective for failing to move to suppress his statements. Movant additionally asserts that the 16 GB flashdrive was improperly seized and that his attorney was also ineffective for failing to move to suppress the flashdrive.

Movant provides his account of events as follows. The agents conducted two interviews: a first interview, for which Movant had not been Mirandized, and a second interview, for which Movant had been Mirandized. (Civ. Dkt. No. 4 at 6). Movant states that he was coerced throughout the interviews because the agents told him that "[Movant] had better answer his questions," and to "not hold back any information or it would be bad for me." (Civ. Dkt. No. 2 at 4). Movant claims that the agents repeatedly threatened him by making these kinds of statements. (*Id.*).

According to Movant, the first interview lasted for about an hour. (Civ. Dkt. No. 2 at 4-5). After the questioning, Movant asked if he could get dressed as he was still in his nightclothes. (*Id.* at 4-5). An agent escorted Movant to his bedroom and, while Movant was getting dressed, Movant spotted his 16 GB flash drive on a shelf. (*Id.*). Movant "remember[ed] their threat[s]" and so Movant identified the flash drive when the agent asked him what he was looking at. (*Id.*). The agent seized the flash drive. (*Id.*).

After this, the agent escorted him back to the kitchen, and the agents began the second interview. (*Id.* at 6). At this point, Movant states that he requested an attorney and that the agents

did not honor his request. Instead, Agent Ulrich allegedly responded by stating, "[Y]eah, but first we need you to sign this and answer some more questions." (*Id.*). The agents then had Movant sign a *Miranda* waiver. (*Id.*). During the second interview, agents made numerous references to his first interview and "review[ed]" the answers Movant had already given. (*Id.*; Civ. Dkt. No. 4 at 6).

a. *Two-Stage Interview Practice*

Movant describes that agents conducted two interviews: a first interview, for which Movant had not been Mirandized, and a second interview, for which Movant had been Mirandized. (Civ. Dkt. No. 2 at 4-6). During the second interview, the agents "review[ed]" the answers Movant had already given in the first interview. (*Id.*). Movant argues that his attorney should have pursued a suppression motion on this basis.

The Supreme Court has addressed such a practice in *Missouri v. Seibert*, 542 U.S. 600 (2004). In *Seibert*, the practice of the local police was for the interrogating officer to give no *Miranda* warnings until after the accused gave a confession, after which the interrogating officer would provide the *Miranda* warnings and lead the accused to cover the same ground a second time. *Id.* The Supreme Court found that giving *Miranda* warnings "midstream" could not effectively comply with the requirements of *Miranda*, and therefore held the first confession and the second, repeated confession were both inadmissible. *Id.* at 616-17.

The expanded record does support that the agents questioned Movant in two distinct phases. The first interview began at 6:55 A.M. and ended at approximately 8:47 A.M. Roughly an hour and fifteen minutes later, around 10:05 A.M., agents returned and began questioning Movant again. However, there is no *Seibert*-type issue because Movant was Mirandized prior to both interviews.

The audio file shows that Movant was Mirandized at the beginning of the recording of the first interview, shortly after 6:55 A.M. (Interview File 1 at 0:4:00). After taking down Movant's biographical information, an agent reviewed Movant's *Miranda* rights and Movant signed a *Miranda* waiver roughly four minutes into the recording. The agents then progressed into preliminary questions about his family life and general computer use. Movant mentioned that he uses his computer for music, video games, and Facebook. Movant stated that he views "adult sites." (*Id.* at 0:17:40). The agents stated that they would examine Movant's computer later and asked if there was any specific pornography the agents should be made aware of now. (*Id.* at 0:24:00). Movant gave evasive answers and then became quiet. Finally, an agent inquired about pornography with "younger women," and Movant asked if the agents were attempting to talk to him about "kiddie porn." (*Id.*). The interview then went into a discussion surrounding child pornography and went on for another 79 minutes. The agents ended the interview at approximately 8:47 A.M. and stopped recording so that the agents could examine Movant's computer.

At around 10:05 A.M.,[16] the agents began recording again. The agents reviewed Movant's *Miranda* rights, and asked Movant to initial the same form he signed earlier to signal that he was again waiving his *Miranda* rights. Movant did so. The agents asked Movant additional questions raised by examining his computer. The second recording is 25:50 minutes long.

At the evidentiary hearing, Movant testified that the first interview (which he referred to as his "confession") was not recorded and that the agents only recorded his second interview. (Evidentiary Hearing at 1:11-1:17 P.M.). Movant denied that he had been Mirandized twice. (*Id.* at 1:20-1:21 P.M.). Movant described that "the way it started" was that the agents asked him what he used his computer for; Movant testified that he mentioned movies, video games, music, and

[16] The agent states roughly 3 minutes into the recording that he is reviewing Movant's *Miranda* rights with him at 10:08 A.M.

Facebook. (*Id.* at 1:20-1:24 P.M.). The agents then asked if Movant watched pornography and what kind of pornography. (*Id.*). Movant emphasized that these questions were not being recorded, and he had not been Mirandized prior to these questions. (*Id.*). Movant testified that he understood his description of the "unrecorded" confession sounds similar to the recorded statement, but he had the "same discussion" with agents after being recorded and Mirandized (for the first time). (*Id.*).

Agent Ulrich testified that he did not ask Movant any questions about pornography before they began the interview, and that they started the interview at 6:55 A.M. (Evidentiary Hearing at 3:13-3:15 P.M.). Agent Ulrich stated that they had entered the house about 6:40 to 6:45 A.M.[17] (*Id.*). Agent J.P. Reneau testified that he had not asked Movant questions about the offense prior to taking Movant's recorded statement. (*Id.* at 2:48-2:49 P.M.).

Comparison between the record and Movant's testimony, in addition to the nature of the questions and answers given during the recorded interviews, support that the first recorded interview is what Movant claims to be his unrecorded and un-Mirandized confession. Contrary to Movant's recollection of events, the undersigned finds that Movant was Mirandized before each interview and that all interviews were recorded.

The undersigned concludes that although two interviews were conducted, no *Miranda* violation occurred. Counsel would not have been able to successfully seek a suppression motion based on a *Seibert* argument. Therefore, counsel was not deficient, and Movant is not prejudiced. *Smith v. Puckett*, 907 F.2d 581, 585 n.6 (5th Cir. 1990) ("Counsel is not deficient for, and prejudice does not issue from, failure to raise a legally meritless claim."); *United States v. Kimler*, 167 F.3d 889, 892-93 (5th Cir. 1999) ("An attorney's failure to raise a meritless argument . . . cannot form

[17] In his testimony and in the recording, Agent Ulrich provides this information in military time ("0655").

the basis of a successful ineffective assistance of counsel claim . . . ."). The undersigned recommends that this ineffective assistance claim be dismissed.

b. *Coercive Statements*

Movant claims that his attorney should have sought suppression of his interview statements based on the argument that his statements were coerced. Movant also asserts that his statement identifying the 16 GB flash drive to the agents was coerced and that the flash drive should have been suppressed as a fruit of his coerced statements.

Movant describes that agents executed a search warrant on his home around 7 A.M. (Civ. Dkt. No. 2 at 4). The agents entered Movant's bedroom and arrested him at gunpoint. (*Id.*). The agents took Movant outside while handcuffed. (*Id.*). Roughly twenty minutes later, the agents uncuffed him and brought him back inside the house, sitting him down at his kitchen table. (*Id.*). Movant states that during this time, the agents seized his "computer, a portable hard drive, and an 8 GB thumb drive . . . ." (*Id.*).

Movant was then questioned by four agents at his kitchen table. (*Id.*). Movant describes that other agents stood in adjacent rooms, appearing to "block[ ] my exits." (*Id.*). Movant mainly asserts that he was coerced because the agents "threatened" him by saying, "[Movant] had better answer [the agent's] questions," and to "not hold back any information or it would be bad for me." (Civ. Dkt. No. 2 at 4). Movant states that the agents repeatedly threatened him by making these kinds of statements throughout the interrogation. (*Id.*). Movant suggests he was still shaken up from the agents entering his home, because Movant also points out that he "had just been thrown on the ground and handcuffed while I had numerous firearms pointed at me." (*Id.*).

A coerced, involuntary statement is different than a statement given by a suspect who was not Mirandized. A coerced confession is excluded from evidence not only because its

involuntariness violates the accused's Fifth Amendment and Fourteenth Amendment rights, but because the courts have recognized that a coerced confession is "inherently untrustworthy." *Dickerson v. United States*, 530 U.S. 428, 433 (2000). "A confession is voluntary if, under the totality of the circumstances, the statement is the product of the accused's free and rational choice." *United States v. Bell*, 367 F.3d 452, 461 (5th Cir. 2004).

The focus of a court's inquiry is on the coerciveness of the police conduct. *United States v. Fernandes*, 285 F. App'x 119, 124 (5th Cir. 2008). That coercive police activity must be the cause of the confession. *Id.*; *Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (coercive police activity must be "causally related" to the confession). A court must ultimately ask "whether a defendant's will was overborne by the circumstances surrounding the giving of [an incriminating statement]." *Dickerson*, 530 U.S. at 434.

The agents may have made statements designed to incentivize Movant into providing more information during his interview; however, these statements did not render the confession involuntary. "Involuntariness is present if there are threats or promises of *illegitimate* action." *United States v. Kolodziej*, 706 F.2d 590, 594 (5th Cir. 1983) (emphasis added). An officer's statement is not "illegitimate" if it is true. *Id.* Encouragement to be honest with the authorities and to be cooperative with the government is not coercion. *United States v. Cardenas*, 410 F.3d 287, 295 (5th Cir. 2005) ("The agents also encouraged her to cooperate with the government as a witness. We have never held that these sorts of customary police tactics constitute such gross intimidation or coercion so as to overcome a defendant's free will and render his statements inadmissible."); *United States v. Paden*, 908 F.2d 1229, 1235 (5th Cir. 1990) ("Encouraging a defendant to tell the truth, however, does not render a statement involuntary."); *United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978) ("[T]elling the [defendant] in a noncoercive manner

of the realistically expected penalties and encouraging her to tell the truth is no more than affording her the chance to make an informed decision with respect to her cooperation with the government.").

The audio recording of Movant's interview reflects that agents did not make coercive statements; rather, the agents encouraged Movant to be truthful. The agents made it clear to Movant that the agents had already seized his computer and would examine his computer at some point. Agent Reneau told Movant "just remember, he's [Ulrich] [going to] go in the computer, I mean, he's [going to] look, so I just don't want any surprises for us." (Interview File 1 at 0:55:00-0:56:00). Agent Ulrich stated to Movant, "you're kind of misleading and changing your story just a little bit, so, but first you said you had some in your download folder, then you came back and you said 'I only had one.' Now you realize, I'm going to see everything," and "everything's [going to] be exposed to me." (*Id.* at 1:59:30-1:01:00).

Agent Ulrich additionally stated:

> [I]t's important that you're honest with us right now, okay, because I don't want to go back and tell my boss, well, 'James wasn't really truthful with us, he was kind of dancing around, you know, he kind of told us this then he told us that, you know, his stories changed just a little bit.' Alright. Okay. So, let's try it again. If I go in and I hook up my software to your computer, which I'm [going to] do in a little bit . . . How many image files and movie files of younger women do you think I'm going to find on your laptop?

(*Id.* at 1:00:45-1:01:30). Later on, Agent Reneau stated:

> [Y]ou're switching your story a little bit—it's fine, I just wanted to make sure, clear, that we're all clear, the worst thing that can happen right now is you tell us a lie, [o]kay, [be]cause I'm telling you and he told you, he's [going to] go into that computer, he's [going to] know it's in there, okay, so just make sure when you're telling us stuff like this, that it's the right stuff, don't change it, don't fabricate it, don't do anything. Stick to what it is. If you don't know, I understand, you don't know.

(*Id.* at 1:05:00-1:06:42). The agents were candid in telling Movant that they would be able to compare his statements about the contents of his computer with the actual contents of his computer. It cannot be said that these statements are "illegitimate" because they are true and because the agents' statements amounted to no more than encouragement to tell the truth.

Movant does not demonstrate there is a reasonable likelihood a suppression motion would have been successful. In light of the totality of the circumstances, the agents' statements were not coercive. This is not to say Movant was devoid of anxiety or felt no pressure. Movant knew that the agents had seized various storage devices—storage devices which Movant knew to contain child pornography.[18] Knowing that the agents were in possession of his storage devices and would examine them likely weighed on Movant's mind, but telling Movant that they would examine his computer and know if he had provided false information does not amount to coercion. Thus, Movant has failed to demonstrate deficient performance or prejudice because the suppression motion would have been frivolous on this ground.

c. *Failure to Honor Request for Attorney*

Movant additionally pleads that he "unambiguously" requested an attorney during the beginning of his second interview. (Civ. Dkt. No. 2 at 6). Movant states that the agents did not honor his request, but instead pressed on with the interview and had him sign a *Miranda* waiver after he orally invoked his right to counsel. (*Id.*). Movant testified similarly at the evidentiary hearing. Movant testified that he requested a lawyer after "they got a confession from me," but before the recording started.[19] (Evidentiary Hearing 1:11-1:14 P.M.). Movant testified that the

[18] Another factor may have played into Movant identifying the additional thumb drive, which was the desire to stop a more invasive search of his home. Agent Ulrich stated to Movant, that "when we walk you in there, both of us, I want you to show me the thumb drive you're talking about, okay, it kind of helps us from tearing your room apart a little further than we need to, okay." (Audio File 1 at 1:38:00-1:39:00).

[19] As discussed earlier, Movant incorrectly believes that his first interview was not recorded and that the audio recording only captured the second interview.

agents told him he would "eventually get one" but it would be "easier" on him if he spoke to the agents first. (*Id.*). The undersigned does not credit this testimony.

The expanded record shows that agents reviewed Movant's *Miranda* rights at the beginning of the second interview, but Movant did not request an attorney at that time. (Interview File 2 at 0:1:25-0:2:58). Rather, Movant vaguely mentioned obtaining an attorney at the end of the second interview.[20] Movant asked, "So how would that work, if I, um, requested a lawyer, would one be brought, or would I have to go find one?" (*Id.* at 0:24:00-0:25:50). An agent responded, "No, what would end up happening is that some point in time if you requested an attorney, which you could do right now, it's your choice, um, cause we really don't have much else to talk about, we're basically terminating the interview—it's pretty much done right now." (*Id.*). The agent explained that they would "contact our chain of command" and that someone higher up will "make a determination on what happens next." (*Id.*). "At that point in time, you have the right to seek counsel, um, you know, do whatever you [want to] do. Your family can do it, you can go, I mean I'm not telling you which way to go." (*Id.*). Movant did not provide any response to the agent's statement. The agent announced that the interview was terminated, and the recording ended at approximately 10:32 A.M.

At the evidentiary hearing, Agent Ulrich stated that he did not recall Movant ever requesting an attorney. (Evidentiary Hearing at 3:14 P.M.). Agent Reneau testified that he had no knowledge that Movant ever requested an attorney. (*Id.* at 2:41 P.M.). As stated earlier, both Agent Ulrich and Reneau testified that they did not begin questioning Movant before starting the recording. The undersigned credits this testimony.

[20] Movant asks this question about 24 minutes into the second interview. The second interview lasts 25:50 minutes.

The recording is consistent with the agents' testimony that Movant did not request an attorney because Movant's question is far from an unambiguous invocation of his right to an attorney. "[T]he suspect must unambiguously request counsel." *Davis v. United States*, 512 U.S. 452, 459 (1994). Movant did not request an attorney. Rather, Movant asked "how would that work" if he *did* request an attorney. (Interview File 2 at 0:24:00-0:25:50). Movant's question amounts to "an ambiguous or equivocal reference to an attorney." *Davis*, 512 U.S. at 459. Even so, the undersigned notes that the agents responded more than appropriately to Movant's question. Noting that they were already at the end of the interview, an agent answered Movant's question to the best of his knowledge and the interview was immediately terminated afterward.

Furthermore, Movant made a distinctly preliminary inquiry into "how [it] would . . . work" if he requested a lawyer. The nature of this question strongly supports that Movant made no earlier request or reference to an attorney. By seeking information about the process of obtaining an attorney—whether one would be brought to him or if he would "have to go find one"—suggests that Movant may have been preparing to request an attorney, but had not yet done so.

Movant's vague reference to an attorney was not a meritorious basis for a suppression motion. Therefore, Movant has not demonstrated that his counsel rendered ineffective assistance.

8. *TOR Browser Claim*

Movant claims that the government knowingly presented false evidence at sentencing regarding the TOR browser.

In order to successfully bring a *Napue/Giglio* claim, the defendant must show that (1) false evidence was presented; (2) the government knew it was false; and (3) the testimony was material. *Devoe v. Davis*, 717 F. App'x 419, 426 (5th Cir. 2018); *see Giglio v. United States*, 405 U.S. 150,

153 (1972). This involves showing that the prosecution either knowingly presented false evidence or "allow[ed] it to go uncorrected when it appear[ed]." *Giglio*, 405 U.S. at 153. The false evidence must be material or, in other words, there is "any reasonable likelihood" that the false evidence affected the outcome of the proceeding. *Id.* The undersigned finds that Movant cannot meet the materiality prong.

During the sentencing hearing, after a series of questions devoted to how Movant obtained child pornography from the internet using the peer-to-peer program, the AUSA asked Agent Ulrich if he learned whether Movant "actually took any steps to avoid detection or was in the process of taking any steps to avoid detection while on-line?" (Crim Dkt. No. 51 at 23). Agent Ulrich testified that Movant did use a TOR Browser, or "onion router." (*Id.*). A TOR Browser "scrambles" the user's I.P. address so that it appears as different I.P. addresses. (*Id.*). Agent Ulrich testified that "Mr. Rios [Movant] stated that he had downloaded the [TOR] browser. When I specifically asked him what he'd planned on doing [with] it, he said it was to hide his activities of what he was doing on-line." (*Id.* at 23-24). On cross-examination, defense counsel did not ask the agent any questions regarding the TOR browser.

Afterwards, the AUSA argued for a more severe sentence based on "the fact that Mr. Rios [Movant] had downloaded the [TOR] browser, which was used to help conceal his identity on-line, showing that he was intending to continue to do this—to commit this crime further, Your Honor." (*Id.* at 28). The District Court found that it should impose a heavier sentence and gave its reasons on the record for doing so. Before sentencing Movant, the District Court stated that it was "troubled" by a few things "in particular," one of which was "the specific conduct geared towards keeping your identity from law enforcement . . . through the [TOR] browser use . . . ." (Crim. Dkt. No. 51 at 43).

The expanded record shows that, perhaps surprisingly, Movant never used the TOR browser in conjunction with the peer-to-peer program, never admitted that he planned on using the TOR browser to obtain child pornography, and never admitted that he knew how to do so.

Movant's interview with HSI agents established that Movant understood what a TOR browser was and that he intentionally downloaded it. After briefly examining Movant's computer, an agent asked Movant why he installed the TOR browser on his computer. (Interview File 2 at 0:7:45-0:9:00). Movant answered that he installed the browser to "see what it was about" and because he had heard about "Maria's Web," which was "deeper than the regular web." (*Id.*). Movant stated that he understood the TOR browser kept the user "anonymous." (*Id.*). The agent asked if Movant installed the TOR browser to hide the fact that he was downloading child pornography. (*Id.*). Movant stated that he didn't know how to use the TOR browser to download files, but that he did know how to download from the other programs. (*Id.*). Movant did not think Shareaza and the TOR browser could work together. (*Id.* at 0:9:00-0:10:00).

The agent told Movant that he thought Movant was "pretty smart," and that "we both know that I can . . . specifically run on an IP based out of a TOR browser." (*Id.* at 0:9:45-0:10:30). Movant replied with "yeah," at which point the agent attempted to clarify by asking, "OK, so you know that you can do that?" (*Id.*). Movant again replied that he knew "you could use the TOR browser, I didn't know you could use it with, like, download porn—download things." (*Id.*).

At the evidentiary hearing, Agent Ulrich testified that "most programs nowadays" detect when a user is using a TOR browser and the programs will automatically display a "TOR" icon, and "that's why I knew he wasn't using a TOR for the peer-to-peer." (Evidentiary Hearing 12:28:55 – 12:32:10 P.M.). The AUSA asked, "so we know he was not using it at least at the time you downloaded this movie [referring to the investigation conducted February of 2015], is that

what you're saying?" (*Id.*). Agent Ulrich replied, "Yes." (*Id.*). The AUSA further asked, "so when that came out, I guess, at the sentencing hearing, the purpose of that testimony was just to show that he's capable of doing it, you were not saying—were you saying that he was using it when he was downloading the child pornography?" (*Id.*). The agent replied, "No, I was not, I was just saying that he stated he was utilizing it to search for weapons and—activities online." (*Id.*).

Agent Ulrich was also questioned by Movant's appointed attorney, Mr. Salinas. Mr. Salinas asked if Agent Ulrich had any reason to believe that Movant was using the TOR browser in connection with the child pornography investigation. (Evidentiary Hearing at 12:21:36 – 12:22:29 P.M.). Agent Ulrich stated that he could not confirm use of the TOR browser in connection with the child pornography investigation conducted in February of 2015, that he did not "know what Mr. Rios was doing with the TOR browser, which is referred to as the onion router—I do know that Mr. Rios stated that he did not utilize the peer-to-peer program through the TOR browser, now, that does not mean that that can't be done, it just means that Mr. Rios stated he didn't do it." (*Id.*). Mr. Salinas asked if Agent Ulrich could draw "an opinion as to whether or not he was using the TOR browser or the onion browser back on the 8th of February?" (*Id.*). The agent responded that he could "say that he [Movant] did not utilize the peer-to-peer program through the TOR browser." (*Id.*).

Agent Ulrich also testified that if Movant had been using the TOR browser to hide his IP address, federal agents still could have found him "eventually." (Evidentiary Hearing at 12:30:00 – 12:31:30 P.M.). Federal law enforcement agencies have tools to track down offenders who use IP scrambling programs, but it does take "a little while" and would not have been as easy. (*Id.*).

At the evidentiary hearing, the government did not contest the fact that Movant never used or admitted to using the TOR browser to obtain child pornography through the peer-to-peer

program. (Evidentiary Hearing 10:43:25 – 10:46:45 A.M.). The government argued that Agent Ulrich's statement at sentencing was proper because it was literally accurate. Movant admitted to using the TOR browser in general and that its purpose was to "hide his activities of what he was doing on-line," even if Movant was not using the TOR browser specifically in connection with child pornography.

The agent's statement *is* literally accurate. Yet, even literally accurate statements may create the presentation of "false evidence." *See United States v. Barham*, 595 F.2d 231, 241 (5th Cir. 1979) (while witness's answer was "truthful in a narrow, literal sense," the testimony conveyed a false impression that witness had not received promise of leniency); *Drake v. Portuondo*, 553 F.3d 230, 243 (2d Cir. 2009) ("The prosecutor plainly crafted the question to achieve literal accuracy while conveying the false impression that [expert]'s work had been validated through publication."); *United States v. Vozzella*, 124 F.3d 389, 392 (2d Cir. 1997) (*Napue* violation occurred when the government introduced financial records that were "partially false," "solicited testimony about the records that was so misleading as to amount to falsity," and should have known that the testimony "conveyed a message so misleading as to amount to falsity"); *United States v. Freeman*, 650 F.3d 673, 680 (7th Cir. 2011) ("*Napue* does not require that the witness could be successfully prosecuted for perjury. In this area of the law, the governing principle is simply that the prosecutor may not knowingly use false testimony. This includes 'half-truths' and vague statements that could be true in a limited, literal sense but give a false impression to the jury.").

What matters is the effect or impression created on the audience. *United States v. Anderson*, 574 F.2d 1347, 1355 (5th Cir. 1978) ("The same rule applies if the prosecution, although not actively soliciting false evidence, passively but knowingly allows it to go uncorrected or allows

the jury to be presented with a materially false impression."); *United States v. Boyd*, 55 F.3d 239, 243 (7th Cir. 1995) ("It is enough that the jury was likely to understand the witness to have said something that was, as the prosecution knew, false."). In this regard, courts have found that a prosecutor's statements are relevant and may amplify the misleading nature of testimony, pushing certain events over the line and into false evidence territory. *See United States v. Barham*, 595 F.2d 231, 241 (5th Cir. 1979) ("Yet the prosecution made no attempt to correct the false evidence. In fact, although perhaps unwittingly, it reinforced [and] facilitated the deception through the questions asked of [two other witnesses]."); *Boone v. Paderick*, 541 F.2d 447, 450 (4th Cir. 1976) (finding that while witness testimony "skirt[ed] the edge of perjury," when coupled with the prosecutor's statements that "were clearly intended to give the impression that [witness] knew nothing about possible lenient treatment . . . and that his testimony in general was the product of an active conscience," it created the knowing presentation of false evidence by the government); *Tassin v. Cain*, 482 F. Supp. 2d 764, 773 (E.D. La. 2007) (emphasizing that the "State not only failed to correct the testimony, but exploited it vigorously in closing argument to solidify a false impression"); *see also United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995) (corruption of due process occurred when prosecutor made false factual representations at side bar and during cross-examination).

The AUSA's line of questioning leading up to the critical point dealt explicitly with child pornography. The following exchange occurred between AUSA Benavides, and Agent Ulrich.

> Q [AUSA Benavides]: And in doing so, during the interview, during the post Miranda interview, did he admit to receiving and downloading child pornography from the Internet?
>
> A [Agent Ulrich]: Yes, sir. He did.
>
> Q: And did he explain to you how he was able to do so? What type of software he was using? And where—where was it that he was obtaining his child pornography from?

A: Mr. Rios stated that he was utilizing a program called Shirasi [sic] and that he would put in specific key words. These key words are more derogative towards images and movies that depict child pornography.

[The AUSA questions the agent as to how Movant obtained child pornography through "Shirasi" or "Shareaza"]

. . .

Q: Okay. And what was the—eventually you—you did seize devices pursuant to the search warrant?

A: Yes, sir.

Q: And did you do a forensic examination of these devices?

A: Yes, sir. I did.

Q: And in doing so, were you able to see the nature of his collection that he had?

A: Yes, sir. I was.

Q: And what was the nature of his collection of child pornography?

A: Mr. Rios would utilize his laptop to download and then he would subsequently save those to an external thumb drive. During the interview, he stated that the movies that he didn't like, that didn't meet his description, he would just delete them and put them in the recycling bin. The movies that were extracted from within the thumb drive, or I believe two thumb drives, contained pre-pubescent children engaged in sexual acts variance [sic].

Q: Okay. And what did the majority of the—the videos consist of in his collection? Are we talking about the lascivious exhibition of the genitals, or penetration? What would the—the majority of videos in his collection, what did they consist of?

A: To the best of my recollection, the vast majority of the videos depicted sexual acts, whether it be vaginal, oral[,] or anal.

Q: Okay. And Agent Ullrich [sic], during the interview with Mr. Rios, did you learn whether or not he actually took any steps to avoid detection or was in the process of taking any steps to avoid detection while on-line?

A: Yes, we actually went and interviewed Mr. Rios and discussed the fact that he was utilizing what's referred to [as] a [TOR] browser.

Q: What is that?

A: A [TOR] browser is more affectionately referred to as a [TOR], but the actual terminology is called the onion router. And what [it] does is it's an anomizer and it basically takes your I.P. and it scrambles it between a multitude of different I.P.'s within different servers throughout the nation. So if I specifically say that your I.P. finds you, and it's coming up as, you know, 1921681110, within minutes later, it could be 2427768 and it could be housed out of New York versus one out Virginia versus one out of California.

Q: And is this something that's commonly used by child pornography collectors?

> A: Yes, sir.
>
> Q: Okay. And Mr. Rios admitted to you that he had downloaded [the TOR] browser?
>
> A: Yes, sir. Mr. Rios stated that he had downloaded the [TOR] browser. When I specifically asked him what he'd planned on doing [with] it, he said it was to hide his activities of what he was doing on-line.

(Crim. Dkt. No. 51 at 17-24). The questions and answers above leave the impression that Agent Ulrich was being questioned specifically as to child pornography.

In context, the question of whether Movant "actually took any steps to avoid detection or was in the process of taking any steps to avoid detection while on-line?" and the agent's answer that "Mr. Rios stated that he had downloaded the [TOR] browser [and] [w]hen I specifically asked him what he'd planned on doing [with] it, he said it was to hide his activities of what he was doing on-line" could easily be taken to mean that Movant had *admitted* he planned to use the TOR browser to hide "his activities" of downloading *child pornography*.[21] (Crim Dkt. No. 51 at 23). This would be problematic because Movant never admitted such a thing. Had the prosecutor relied on the vaguely-described account of Movant's admission as evidence of the intent to use the TOR browser to hide child pornography activity, the prosecutor would have strayed into the presentation of false evidence. As is, the prosecutor refrained from discussing the admission.

After the witness stepped down, the prosecutor highlighted that the relevant information was "the fact that Mr. Rios [Movant] had downloaded the [TOR] browser" and that this fact meant that Movant should receive greater punishment, because Movant "was intending to continue to do this—to commit this crime further . . . ." The prosecutor stressed that the TOR browser was being

---

[21] Context matters. Leading up to the critical point, the prosecutor established with the agent that he was being questioned as to child pornography. *See, e.g., United States v. Serafini*, 7 F. Supp.2 d 529, 541 (M.D. Pa. 1998) (regarding perjury charges) ("The prosecutor plainly led Frank Serafini to understand that he was being questioned as to whether he had personally received any other reimbursement checks in connection with his contribution to the Dole Committee. If the prosecutor wanted to shift the focus of his questioning, it was incumbent upon him to do so with clarity.").

used or would be used in conjunction with the crime of receiving child pornography. Pushing this argument, while in possession of knowledge that contradicts this conclusion, is somewhat troubling.[22]

Even assuming *arguendo* that the government crossed the line into presenting false evidence, however, the undersigned finds that Movant cannot meet the materiality prong.

First, although Movant did not admit that he planned on using the TOR browser for child pornography or knew how to, inferring the defendant's intent from his actions is proper, and sometimes necessary. *See United States v. Lowe,* 38 F.3d 570, 1994 WL 574738, at *4 (5th Cir. 1994) (direct evidence of mental state is "rare indeed"). The Court may have just as well inferred Movant's intent based on the information presented at sentencing that: (1) Movant downloaded the TOR browser, (2) that Movant collected child pornography, and (3) that the TOR browser is a commonly used tool of child pornography collectors.

Second, there is additional information in the record that supports the District Court's conclusion that Movant engaged in conduct geared towards evading law enforcement. Movant took other steps to prevent detection such as "send[ing] the files to the 'trash can' folder on his computer after viewing them" and saving the videos to external thumb drives. (Crim. Dkt. No. 25 at 4-5, ¶ 6-7). This information was included in the PSR. (*Id.*). Agent Ulrich also testified to Movant's practice of deleting files and moving files to external thumb drives. Whatever his chosen

[22] A federal agent's knowledge is imputed to the prosecutor. *See United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) ("Had the investigators been federal, their knowledge would have been imputed to the prosecution. . . . [T]his Court has declined to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel."). Both agent and prosecutor knew that (1) the agent had confirmed by examining the computer that Movant had not used the TOR browser in connection with the Shareaza program, (2) Movant had not stated he planned on using the TOR browser for child pornography, and (3) Movant stated he did not know he could use the two programs together.

method for avoiding detection, and whether that method involved the TOR browser or not, Movant cannot contest that he took steps to prevent being discovered by law enforcement.

Third, the District Court listed numerous reasons for sentencing Movant at the highest end of the Guidelines. Multiple other factors concerned the Court: that Movant chose employment that brought him in contact with school age children; the especially young ages of the children in the videos; that there were more images involved "than the Guidelines will ever account [for];" that Movant intentionally sought out child pornography; and that Movant enjoyed "shock and awe" videos. (Crim. Dkt. No. 51 at 40, 42-43).

Movant does not show that there is "any reasonable likelihood" that the allegedly false evidence affected the outcome of the proceeding.

Finally, although the damaging testimony could have been mitigated by the information that (1) Movant did not admit he planned on using the TOR browser to obtain child pornography, and (2) Movant expressed that he did not know that the Shareaza program and the TOR browser could work together, this mitigating information was in the defense's possession. Defense counsel had access to the audio recording of the interview and to his own client. Defense counsel could have cross examined Agent Ulrich at sentencing and elicited testimony clarifying these points.[23]

Although the agent's testimony *could* have been cleared up on cross examination, defense counsel did not feel there was a discrepancy between Agent Ulrich's testimony and Movant's admission.[24] (Evidentiary Hearing at 12:56 – 1:01 P.M.). Mr. Jarvis testified that he listened to the audio recording. (*Id.*). Mr. Jarvis recalled that Agent Ulrich testified that Movant admitted to

[23] The PSR also included that "[t]he defendant also admitted that he had downloaded a TOR browser in an effort to protect his identity while searching the internet." (Crim. Dkt. No. 25 at 4, ¶ 7). Counsel did not file clarifying objections to this section of the PSR.

[24] There is not an ineffective assistance of counsel claim before the Court on this issue.

using the TOR browser to conceal his "online activity." (*Id.*). Mr. Jarvis testified that he felt this testimony was consistent with what Movant stated in the interview, and also testified that he "didn't understand the recording to suggest that Mr. Rios was using the [TOR] browser[ ] specifically for pornographic issues—I think that the TOR, or the onion router . . . you can run your own computer with that, but it's not exclusively limited to pornography, necessarily." (*Id.*).

Mr. Jarvis was aware of Movant's interview statements and, while listening to Agent Ulrich's testimony, decided that the testimony was sufficiently consistent with Movant's admission.[25] "[C]ourts have been extremely reluctant to find a deprivation of due process when the prosecution has provided the defense with the necessary information and it can utilize the information, but decides, for tactical reasons, not to use such information." *United States v. O'Keefe*, 128 F.3d 885, 894 (5th Cir. 1997); *United States v. Bethley*, 973 F.2d 396, 399 (5th Cir. 1992) (defense counsel did not follow up on witness's incorrect statement about his convictions although counsel had access to witness's state and federal criminal history). The undersigned is similarly reluctant to find a deprivation of due process here.

For the above reasons, the undersigned recommends that this claim be dismissed.

9. *Failure to Prepare and Raise Objections*

Movant argues that his counsel was ineffective for failing to prepare for sentencing and "failing to raise appropriate objections" to the witness testimony presented at sentencing. (Civ. Dkt. No. 1 at 2; Civ. Dkt. No. 4 at 7). Movant claims that his attorney failed to conduct an adequate investigation, "which, at a minimum, required him to listen [to] the recording of my

[25] Mr. Jarvis's testimony brings this analysis back to the first *Napue* question: whether the evidence presented can really be considered false evidence at all. Agent Ulrich's testimony, as understood by Mr. Jarvis, was not misleading at all and, therefore, there would be no obligation on his end to clarify and no objectionable failure of the prosecution to "correct" the testimony. *See Mills v. Scully*, 826 F.2d 1192, 1196 (2d Cir. 1987) (noting that "false" witness testimony could be viewed as a misunderstanding).

interrogation[.]" (Civ. Dkt. No. 4 at 7). He also argues that his attorney should have objected to the vulnerable victim enhancement, and, to obtain rebuttal evidence, should have "hire[d] an investigator" or a "computer expert" "to perform an independent examination of my computer." (*Id.* at 23). Movant claims counsel could have objected to the vulnerable victim enhancement based on insufficient evidence, because the government failed to provide details like the "movies' titles, or what the search terms were." (*Id.* at 24). Finally, Movant argues that counsel should have advanced a legal argument challenging *United States v. Jenkins*, 712 F.3d 209 (5th Cir. 2013), based on a Fourth Circuit case. (*Id.* at 22, 24). These individual arguments are addressed in turn below.

First, Movant claims, in a conclusory fashion, that his attorney did not listen to the audio recording. *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983) ("[M]ere conclusory allegations do not raise a constitutional issue in a habeas proceeding."). Movant does not plead any facts that show his attorney failed to do so other than, as part of his now-waived *Brady* claim, mistakenly claiming that his attorney never received the audio recording from the government. As such, the claim that his attorney conducted an inadequate investigation by virtue of failing to listen to the audio recording is inadequately pled. The Court also notes that Mr. Jarvis mentioned in his testimony that he had listened to the audio recording.

Second, Movant does not show that Mr. Jarvis acted unreasonably by failing to hire an independent expert to examine Movant's computer in order to rebut the vulnerable victim enhancement. Movant believes that an expert could have unearthed enough circumstantial evidence from the computer to show that Movant lacked awareness that two movies contained vulnerable victims, such as evidence that the videos had not yet been watched or previewed. (Civ. Dkt. No. 4 at 23). Effectively, Movant argues that he must have had actual knowledge that the

videos contained especially young victims. This argument is misplaced. The vulnerable victim enhancement applies when the defendant knew *or* "should have known" of the victim's unusual vulnerability. U.S.S.G. § 3A1.1(b)(1) (2014). Although Movant also claims he lacked constructive knowledge, he misunderstands what constructive knowledge is. Even assuming that, as Movant claims, the two movies "slipped past" him undetected, the arguments made in his pleadings still go toward *actual* knowledge.[26] (Civ. Dkt. No. 4 at 18). "[W]hen a party 'should have known' something, they have 'constructive knowledge,' which is a lesser standard meaning 'knowledge that one using reasonable care or diligence should have.' " *United States v. Myers*, 772 F.3d 213, 220 (5th Cir. 2014). Both the ability to preview the videos and, once downloaded, his possession of the videos provided him with the ability to know the contents of the videos. Movant had constructive knowledge.

Relatedly, Movant argues that he did not target infant victims, likely referring to older, pre-1995 editions of the Sentencing Guidelines which required that the defendant "target" the victim because of their unusual vulnerability. *See United States v. Burgos*, 137 F.3d 841, 843 (5th Cir. 1998) (noting that Amendment 521 went into effect November 1, 1995); *United States v. Etoty*, 679 F.3d 292, 294 (4th Cir. 2012) (noting that "the Sentencing Commission adopted Amendment 521, rendering it unnecessary for a sentencing court to find that a defendant had specifically targeted his victim"). Movant was sentenced using the 2015 Sentencing Guidelines.

Legal strategy is within the province of defense counsel, and advancing an ineffective assistance argument based on counsel's failure to raise a specific argument is seldom successful. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments . . . ." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Counsel, not

[26] Movant argues he lacked knowledge because he did not thoroughly review all 147 movies downloaded. (Civ. Dkt. No. 4 at 18).

client, decides what issues are presented. *Id.* Attempting to show that Movant did not have constructive knowledge of the age of the victims in the videos would have been frivolous because of the fact that Movant had the ability to preview the videos and possessed the videos. Counsel is not deficient for failing to raise a frivolous argument, and Movant is not prejudiced.

Third, Movant claims counsel should have objected to the vulnerable victim enhancement based on insufficient evidence, because the government failed to provide details like the "movies' titles, or what the search terms were." (Civ. Dkt. No. 4 at 24). This objection would have been meritless. This level of specificity is not necessary. "[F]indings of fact for sentencing purposes need meet only the lower standard of 'preponderance of evidence.' " *United States v. Hull*, 160 F.3d 265, 269 (5th Cir. 1998). Additionally, even if Movant had disputed the application of the vulnerable victim enhancement, because a PSR "generally bears sufficient indicia of reliability to be considered as evidence," *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995), "[a]t sentencing, the defendant bears the burden of rebutting the evidence used against him for purposes of sentencing by proving that [the PSR] is materially untrue, inaccurate or unreliable," *United States v. Solis*, 299 F.3d 420, 455 (5th Cir. 2002). It would have been the *defense's* burden to show that the children in the videos were *not* vulnerable victims. Notwithstanding the legal contortions Movant makes in arguing that the law should account for the fact that child pornography victims continue to age after they are victimized and will one day be adults, Movant does not suggest there was any evidence that the victims were not children in the videos.

Moreover, trial counsel averred that he reviewed the videos to confirm that the vulnerable victim enhancement applied. (Civ. Dkt. No. 27 at 1-2). Counsel stated that these files contained the "most horrific video images I have ever seen in my life" and that the videos "satisfied the legal criteria for the application of the Vulnerable Victim enhancement." (*Id.*). Counsel's decision to

avoid objecting to the enhancement, after thorough investigation, is legally sound. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Movant does not demonstrate deficient performance or prejudice on this ground.

Finally, Movant argues that counsel should have advanced a legal argument challenging *United States v. Jenkins*, 712 F.3d 209 (5th Cir. 2013), based on a Fourth Circuit case, *United States v. Dowell*, 771 F.3d 162 (4th Cir. 2014).[27] (Civ. Dkt. No. 4 at 22, 24). As stated, counsel is responsible for determining what legal argument to raise. Movant does not show counsel acted unreasonably in failing to raise this proposed argument, because an attorney may sensibly decline to make such an argument in light of the fact that Fourth Circuit cases are not controlling in this district. Therefore, Movant has not demonstrated deficient performance.

The undersigned recommends that this ineffective assistance claim be dismissed.

10. *Failure to Raise Claims on Appeal*

Movant argues that appellate counsel rendered ineffective assistance by failing to challenge the vulnerable victim and distribution enhancements on appeal and for failing to challenge the "false information" provided at sentencing on appeal. (Civ. Dkt. No. 1 at 2).

As is evident from the prior arguments addressed in this Report and Recommendation, the vulnerable victim and 2-point distribution enhancement were correctly applied to Movant. Additionally, as established, there was no "false information" provided at sentencing. Counsel is not unreasonable for declining to raising these arguments on appeal. There is no deficient performance and no prejudice.

[27] Movant's substantive *Jenkins* argument is incorporated into his first claim.

Furthermore, assuming Movant has some additional argument to be made regarding these issues that has not already been addressed, it is counsel's duty to "examine the record with a view to selecting the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). Even if Movant had some colorable argument to present, an effective advocate removes weaker arguments to avoid diluting the brief, focusing on what he believes are the best legal claims. Appellate counsel focused on two arguments of choice in his brief, and Movant does not show he should be faulted for doing so. *See* Brief for Appellant, *United States v. Rios*, No. 16-40012 (5th Cir. May 9, 2016). Movant does not show that appellate counsel rendered ineffective assistance.

The undersigned recommends that this claim be dismissed.

IV. CONCLUSION

Recommended Disposition

After careful review of the record and the relevant law, the undersigned respectfully recommends that Movant's § 2255 motion be **DENIED**, that his claims be **DISMISSED** with prejudice, and the case be closed.

Certificate of Appealability

It is recommended that the District Court **DENY** a certificate of appealability ("COA").

A movant may not appeal the final order of a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1). The Rules Governing Section 2255 Proceedings instruct that the District Court "must issue or deny a COA when it enters a final order adverse to the applicant." Rule 11, The Rules Governing Section 2255 Proceedings. The undersigned must address whether Movant is entitled to a COA because it is recommended that his § 2255 motion be dismissed

A movant is entitled to a COA when he shows that a reasonable jurist would find it debatable "whether the petition states a valid claim of the denial of a constitutional right" and

"whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253(C). Because the undersigned finds that the movant fails to meet this threshold, it is recommended that the District Court deny a COA.

Notice to the Parties

Within fourteen days after being served a copy of this report, a party may serve and file specific, written objections to the proposed recommendations. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). Failure to file written objections within fourteen days after service shall bar an aggrieved party from de novo review by the District Court on an issue covered in this report and from appellate review of factual findings accepted or adopted by the District Court, except on grounds of plain error or manifest injustice.

The clerk of this Court shall forward a copy of this document to the parties by any receipted means.jame

SIGNED this 12th day of August, 2019, at McAllen, Texas.

J. SCOTT HACKER
UNITED STATES MAGISTRATE JUDGE

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 8, 2022
Lyle W. Cayce
Clerk

No. 21-40502

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RUBEN JAMES RIOS,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:17-CV-92

Before HIGGINBOTHAM, DUNCAN, and WILSON, *Circuit Judges.*

PER CURIAM:

A member of this panel previously DENIED the motion for a certificate of appealability and DENIED AS MOOT the motion to proceed in forma pauperis. The panel has considered Appellant's motion for reconsideration of the denial of the motion for a certificate of appealability.

IT IS ORDERED that the motion is DENIED.