W.D.N.Y.
19-cv-6180
04-cr-6180
Siragusa, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of January, two thousand twenty-three.

Present:

Guido Calabresi,
Denny Chin,
Eunice C. Lee,
Circuit Judges.

Donald James Anson,

Petitioner-Appellant,

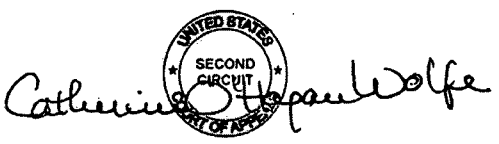
v. 22-1611

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

DECISION AND ORDER

vs.

04-CR-6180-CJS-1
19-CV-6180 CJS

DONALD ANSON,

Defendant.

INTRODUCTION

Now before the Court is a motion (ECF No. 288) by Donald Anson ("Defendant") to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. For the reasons discussed below, the application is denied.

BACKGROUND

The reader is presumed to be familiar with the lengthy history of this action. Briefly, in 2006 Defendant was convicted after a jury trial of two counts of violating 18 U.S.C. § 2252A(a)(1) (transportation of child pornography), one count of violating 18 U.S.C. § 2252A(a)(2)(A) (receipt of child pornography), and 39 counts of violating 18 U.S.C. § 2252A(a)(5)(B) (possessing a computer containing child pornography). The Court sentenced Defendant principally to 288 months' imprisonment. Thereafter, the United States Court of Appeals for the Second Circuit ("the Second Circuit") twice remanded the case for resentencing. *See United States v. Anson*, 304 F. App'x 1 (2d Cir. 2008) ("*Anson I*") and *United States v. Anson*, 429 F. App'x 61 (2d Cir. 2011) ("*Anson II*").

At the third sentencing proceeding, this Court sentenced Defendant to 180 months on two counts of transportation of child pornography and on one count of receipt of child pornography and concurrent sentences of 120 months on 39 counts of possessing a computer containing child pornography. Defendant then filed a third direct appeal, "contesting the procedural and substantive reasonableness of his sentence, but the Second Circuit dismissed the appeal as moot because Defendant was by then on supervised release and had no continuing stake in the issues he had raised on appeal. *See, United States v. Anson*, 707 F. App'x 51, 52 (2d Cir. 2017) ("*Anson III*") ("Here, Anson asserts no claim regarding his term of his supervised release. In addition, the District Court already reduced the length of Anson's supervised release. In these circumstances and on this record, we find it unlikely that the District Court might again alter the term of supervised release. We therefore conclude that Anson lacks a continuing stake in the outcome of this appeal and that there is no live case or controversy before us. In view of this disposition, we may not reach the merits of Anson's appeal.").

Defendant then filed the instant Section 2255 application (ECF No.288), which purports to raise the following fourteen claims: 1. Violation of Double Jeopardy Clause for sentences imposed (in 2014) for convictions for receipt of child pornography and possession of child pornography, since the Government relied on the same images to establish receipt and possession; 2. *Brady* violation due to the Government's failure to disclose a forensic report from the search of Sago Network's web server underlying the search warrant; 3. Ineffective assistance of counsel based on counsel's failure to raise Speedy Trial Act and constitutional speedy trial issues; 4. Ineffective assistance of counsel based on counsel's failure to obtain the Sago Networks forensics report; 5.

Violation of the Fourth Amendment due to the search warrant having been executed beyond the 60-day time limit contained in the warrant; 6. Ineffective assistance of counsel based on counsel's failure to argue a Fourth Amendment violation arising from the alleged late execution of the search warrant; 7. Ineffective assistance of counsel based on counsel's failure to advise petitioner that he could procure an expert witness through the Criminal Justice Act; 8. Ineffective assistance of counsel based on counsel's performance during trial; 9. Ineffective assistance of counsel in connection with a post-trial Rule 29(c) motion; 10. Ineffective assistance of counsel based on counsel's handling of pre-trial motions; 11. Violation of Attorney-Client confidentiality based on the U.S. Marshal Service's alleged mishandling of Defendant's legal materials during Defendant's transport from the Southern District of Florida to the Western District of New York; 12. Ineffective assistance of counsel based on appellate counsel's failure to argue issues pertaining to the PSR; 13. Violation of Double Jeopardy and Due Process arising from multiple charges for possession of child pornography involving multiple computer disks found at a single location; and 14. Denial of a fair trial based on the Prosecutor and Court misleading the jury concerning evidentiary and chain-of-custody issues. In connection with Claims 2 and 4 above, alleging a *Brady* violation and ineffective assistance of counsel, respectively, Defendant also seeks discovery of the Sago Networks forensic report.[1] (ECF No. 289).

The Government filed a response (ECF No. 295) contending that Grounds 1, 5 and 13 are procedurally barred, since Defendant unsuccessfully raised them on direct appeal, and also meritless; that Grounds 2, 11 and 14 are procedurally barred, because Defendant did not raise them on direct appeal and cannot show either cause and

[1] As discussed below, the Court previously denied Defendant's motion to compel discovery of the report prior to the second re-sentencing.

prejudice for failing to raise them or actual innocence, and also meritless; and that the remaining grounds alleging ineffective assistance of counsel are meritless. Defendant filed a reply (ECF. No. 303). The Court has considered the parties' submissions and the entire record.

ANALYSIS

Defendant's *Pro Se* Status

Since Defendant is proceeding *pro se*, the Court has construed his submissions liberally, "to raise the strongest arguments that they suggest." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994).

Section 2255 Principles

Section 2255 provides, in relevant part, as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). "[A] collateral attack on a final judgment in a federal criminal case is generally available under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir.1995) (quoting *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962)).

An Evidentiary Hearing is Not Required

The Court may dismiss a section 2255 petition without conducting a hearing if the petition and the record "conclusively show" that the defendant is not entitled to relief. 28

U.S.C. § 2255(b). Here, the Court finds that a full evidentiary hearing is not required because there are no material factual disputes and the record conclusively shows that Defendant is not entitled to relief.

The Application for Discovery is Denied

Defendant has asked the Court to compel discovery of a forensic report prepared by an investigator following the execution of a search warrant on December 30, 2003, for the content of www.onlinesharingcommunity.com ("OSC") on servers at Sago Networks in Tampa, Florida.[2] (ECF No. 305). Defendant maintains that the report would show that ICE Special Agent Timothy Kosinski ("Kosinski") lied in his affidavit in support of the application for a search warrant of Defendant's home, by misrepresenting what was found on the Sago Network's server: "The Gov[ernment] made false claims regarding the content of the report in its affidavit to obtain the search warrant (*i.e.* that it contained petitioner's IP address, that the report identified the petitioner as the actual person who uploaded images, that a 'user number' could uniquely identify which person was accessing the site, etc." ECF No. 288 at p. 5. Defendant contends that the information on the Sago Network server would only have shown that *someone*, not necessarily him, used his OSC password to upload images of child pornography. In other words, Defendant seeks the forensic report to help him prove that he never uploaded child pornography. Defendant also vaguely indicates that he wants "copies of letters" to him from the Federal Public Defender's office, containing "misstatements regarding important laws and rules," that he intends to use in support of claim of ineffective assistance of counsel.

[2] *See, generally*, Aff. of ICE Special Agent Timothy Kosinski, ECF No. 30-4.

The legal principles applicable to requests for discovery in motions under Section 2255 are clear:

> "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *see also Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009). Instead, Rule 6(a) of the Rules Governing Section 2255 Cases provides that "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law." 28 U.S.C. § 2255 Rule 6(a). A petitioner satisfies this "good cause" standard when "'specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief." *Bracy*, 520 U.S. at 908–09 (*quoting Harris v. Nelson*, 394 U.S. 286, 300 (1969)). "Otherwise, where a petitioner's allegations do not establish a prima facie case for relief, discovery need not be ordered." *Capalbo v. United States*, Nos. 10 Civ. 2563 (RJH) (JLC), 02 Cr. 1237 (RJH), 2012 WL 611539, at *2 (S.D.N.Y. Feb. 24, 2012) (*citing Evans v. Miller*, No. 04 Civ. 9494(DAB) (DFE), 2008 WL 759357, at *2 (S.D.N.Y. Mar. 21, 2008) (citation omitted)). "Generalized statements regarding the possible existence of discoverable material do not constitute good cause." *Id.* at *3 (*citing Renis v. Thomas*, No. 02 Civ. 9256(DAB)(RLE), 2003 WL 22358799, at **1–2 (S.D.N.Y. Oct. 16, 2003)). Similarly, "[a] court may deny a petitioner's request for discovery 'where the petitioner provides no specific evidence that the requested discovery would support his habeas corpus petition.'" *Ruine v. Walsh*, No. 00 Civ. 3798 (RWS), 2005 WL 1668855, at *6 (S.D.N.Y. July 14, 2005) (quoting *Hirschfeld v. Comm'r of the Div. of Parole*, 215 F.R.D. 464, 465 (S.D.N.Y. 2003)). Relatedly, "[w]here the request for discovery is a mere fishing expedition, the court will not grant it." *Corines v. Superintendent, Otisville Corr. Facility*, No. 05-CV-2056 (NGG) (SMG), 2008 WL 4831729, at *2 (E.D.N.Y. Nov. 6, 2008) (citing *Perez v. U.S.*, 378 F. Supp. 2d 150, 157 (E.D.N.Y. 2005)).

Viola v. United States, No. 3:15-CV-01398 (VLB), 2016 WL 1664756, at *2 (D. Conn. Apr. 26, 2016); *see also, Lewal v. United States*, 152 F.3d 919 (2d Cir. 1998) ("Rule 6(a) of the Rules Governing Section 2255 Proceedings For the United States District Courts provides that a § 2255 petitioner is entitled to undertake discovery only when 'the judge

in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.'").

Here, the Court finds that Defendant has not made the required showing of good cause for any of the discovery that he seeks. To begin with, Defendant's contention that the forensic report could establish that he did not upload child pornography to his OSC account is fanciful considering all the evidence to the contrary, including his own admission to Agent Kosinski that he uploaded images of child pornography using his OSC account. ECF No. 30-6 at p. 2.

Moreover, Defendant's assertion that the Government lied about the forensic report is unsupported by the record. As mentioned earlier, Defendant maintains that the forensic report would show that Kosinski lied in his search warrant affidavit by asserting that the forensic examination of Sago Network's server showed that Defendant was "the actual person who uploaded images" of child pornography. However, the Court reads Kosinski's affidavit to indicate that there was probable cause to believe that Defendant uploaded the images, since the information from Sago Networks showed that the images were uploaded by someone using Defendant's personal OSC "assigned member number" (which was automatically linked by Sago Networks with Defendant's email account and OSC username), which Defendant has not shown to be false.[3]

---

[3] *See, generally*, Kosinski Affidavit, ECF No. 30-4; *see also, id.* at ¶ ¶ 25-26 (explaining that the OSC member number was linked to the subscriber's email account and username and added as a prefix to the name of any uploaded image file); *see also*, Report and Recommendation, ECF No. 51 at p. 10 ("Kosinski learned that the OSC website maintained a record of all user activity based upon the assigned member numbers. (Kosinski Aff. at ¶ 25). When a member of OSC uploaded an image to the site, his or her corresponding member number was added to the name of the image file. (Kosinski Aff. at ¶ 26). The ICE Investigation provided Kosinski with a listing of all images uploaded to the OSC website by member number 10672. Based upon this information and a review of the uploaded images, Kosinski concluded that between August 23, 2003 and September 17, 2003, Anson uploaded four images of child pornography to the OSC website. (Kosinski Aff. at ¶¶ 32-33). A cross-reference of the IP address (65.229.131.104) of the computer used by OSC member number 10672 with the member name "malto2" and e-mail address donjanson.1@juno.com revealed that that IP address was assigned to Juno Online Services. A Juno Online

Furthermore, the Second Circuit expressly rejected those same arguments by Defendant about the search warrant application. *See, Anson I*, 304 Fed.Appx. at *3 ("He argues that the search warrant was invalid because (a) the affidavit that supported it was riddled with alleged half truths and omissions and (b) there was no probable cause to issue the warrant. . . . None of these arguments has merit. With respect to the affidavit in support of the search warrant, the record is devoid of evidence suggesting that it contained information that the affiant knew was false or would have known was false except for his reckless disregard of the truth, and the information that it contained was sufficient, in our view, to support a finding of probable cause to search Anson's residence.") (citation and internal quotation marks omitted).

Additionally, this Court already denied Defendant's motion to compel discovery of the forensic report prior to the last sentencing in this action, *see, U.S. v. Anson*, No. 04-CR-6180, 2014 WL 222017 at *2 (W.D.N.Y. Jan. 21, 2014), and he has not shown that the Court's ruling in that regard was incorrect. Defendant's request for discovery is denied.

Grounds One, Five and Thirteen Are Procedurally Barred as Having Been Already Raised and Denied on Direct Appeal

Defendant's Ground One alleges that the sentences imposed by the Court in 2014 for receipt and possession of child pornography violate double jeopardy since the Government relied on the same images to establish receipt and possession; Ground Five alleges a Fourth Amendment violation based on the Government's supposed execution of a search warrant beyond the deadline contained in the Warrant; and Ground Thirteen

Services records check confirmed that the e-mail address donjanson.1@juno.com was assigned to Donald J. Anson at 89 Garland Avenue, Rochester, New York. (Kosinski Aff. at ¶¶ 34-35).

alleges a violation of Defendant's double jeopardy and due process rights insofar as he was convicted of multiple counts of possessing child pornography stored on multiple computer disks found at a single location. The Government maintains that these claims are procedurally barred since the Second Circuit already considered and rejected them on direct appeal.

The Court agrees with the Government, since on this point the applicable law is clear:

> It is well established that a § 2255 petition cannot be used to 'relitigate questions which were raised and considered on direct appeal.'" *United States v. Sanin*, 252 F.3d 79, 83 (2d Cir.2001) (quoting *Cabrera v. United States*, 972 F.2d 23, 25 (2d Cir.1992)); *see also Douglas v. United States*, 13 F.3d 43, 46 (2d Cir.1993) ("[A]ny claim raised by [petitioner] ... that was also raised ... on direct appeal of his conviction is precluded from consideration by this Court."). [However, a] claim is not barred from being brought in a § 2255 motion where it rests upon a different legal "ground" for relief than the one previously raised. *See Williams v. United States*, 731 F.2d 138, 141-42 (2d Cir.1984).

United States v. Pitcher, 559 F.3d 120, 123 (2d Cir. 2009). Here, the issues contained in Grounds One, Five and Thirteen were considered and denied by the Second Circuit as part of Defendant's first direct appeal. *See, U.S. v. Anson*, 304 Fed.Appx. 1, 2008 WL 4585338 (2d Cir. Oct. 15, 2008).[4] Accordingly, Claims One, Five and Thirteen are denied

[4] This Court has also twice previously denied the same arguments in Grounds One and Thirteen, both times noting that the Second Circuit had also denied it in connection with Defendant's first appeal. *See, United States v. Anson*, No. 04-CR-6180, 2012 WL 2873832, at *2 (W.D.N.Y. July 12, 2012) ("As he did in *Anson I*, in the subject applications, Anson again maintains that Counts 4 through 40, 42 and 43, each charging a count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), are multiplicious and violate the Double Jeopardy Clause. . . . [T]he Counts 4 through 40 and Counts 42 and 43 are not multiplicious and do not violate either the rule of lenity or the Double Jeopardy clause of the Constitution."); *see also, United States v. Anson*, No. 04-CR-6180, 2014 WL 222017, at *1, 3 (W.D.N.Y. Jan. 21, 2014) ("The above captioned case is before the Court on the following motions by Defendant: . . . a motion, ECF No. 2352 to dismiss Counts 4–43 ... as being a lesser included offenses of Count 3 ... in violation of the double jeopardy clause of the 5th amendment ... and/or in the alternative to dismiss Counts 3–43 ... for violating the specificity requirement of the 6th Amendment for failing to insure the Grand Jury and Trial Jury indicted and convicted on the same evidence (illegal image) and for failing to protect against "double

as procedurally barred. To the extent Defendant maintains that his 2014 sentence nevertheless violates double jeopardy since this Court failed to follow caselaw from other circuits, the argument lacks merit.[5]

Grounds Two, Eleven and Fourteen Are Procedurally Barred, as Defendant Failed to Raise Them on Direct Appeal, and Also Lack Merit

Defendant's Ground Two alleges a *Brady* violation based on the Government's failure to provide him with the Sago Networks forensic report; Ground Eleven alleges that the U.S. Marshal Service interfered with attorney-client confidentiality when it lost some of Defendant's legal materials, including three unspecified letters that he maintains would have helped his defense, during transports to and from court, which he made known to this Court on multiple occasions;[6] and Ground Fourteen alleges that the Prosecutor and the Court combined to mislead the jury by having on-record conversations concerning evidentiary foundation issues outside the presence of the jury. The Government contends that these grounds are procedurally barred, since Defendant could have raised them on direct appeal but did not (and cannot show either cause and prejudice for failing to do so or actual innocence), and that they are also meritless.

Defendant replies that the failure to raise the issues on appeal was due to ineffective assistance of counsel. *See*, Defendant's Reply, ECF No. 303 at pp. 4-5.

---

jeopardy ." . . . In his application, Anson maintains that Counts 4–43, each of which accused him of possession of child pornography, must be dismissed based upon his argument that they are lesser included offenses of Count 3, receipt of child pornography. He further maintains that Counts 3–43 must be dismissed, since each count fails to meet the specificity requirement. As the Government points out, both of these arguments were addressed in Anson I, 304 Fed. Appx. 1. Therefore, Anson's motion to dismiss, ECF No. 235, is denied.").

[5] *See*, ECF No. 288 at p. 4 ("By 2014, every all of the Circuits, except the Second (which had not yet addressed the issue) agreed that possession WAS a lesser included offense of receipt and the law as accepted at the time of sentencing should have been applied but was not.").

[6] *See*, Section 2255 Motion, ECF No. 288 at p. 19 ("Among the many things missing were three letters which would have a major impact on two of the most serious counts against me, and also have proved the Gov. made false claims in their 'affidavit' to obtain the search warrant.").

In determining whether Grounds Two, Eleven and Fourteen are procedurally barred, the legal principles are clear:

> A defendant is also barred from raising claims in his § 2255 motion that he failed to raise on direct appeal unless he shows cause for the omission and prejudice resulting therefrom.[7] *See Femia v. United States*, 47 F.3d 519, 524 (2d Cir.1995). A defendant may raise such claims "'where the issues were not raised at all on direct appeal due to ineffective assistance of counsel.'" *Underwood v. United States*, 15 F.3d 16, 18 (2d Cir.1993) (*quoting Barton v. United States*, 791 F.2d 265, 267 (2d Cir.1986)).

United States v. Perez, 129 F.3d 255, 260–61 (2d Cir. 1997); *see also, Sanders v. United States*, 1 F. App'x 57, 58 (2d Cir. 2001) ("A petitioner cannot avoid this rule of procedural default merely by asserting that his counsel made a significant error by failing to raise the claim; rather, petitioner must show that counsel's performance was constitutionally ineffective.") (citation omitted).

The legal standards applicable to claims of ineffective assistance of counsel are well-settled:

> To succeed on a claim of ineffective assistance, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness" and that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Rodriguez v. United States, 767 F. App'x 160, 163 (2d Cir. 2019); *see also*, *Marston v. United States*, No. 17-CR-298 (JGK), 2020 WL 6701014, at *3 (S.D.N.Y. Nov. 13, 2020)

---

[7] A defendant may alternatively rely on the actual innocence exception. *See, Young v. United States*, No. 21-20, 2022 WL 2136864, at *2 (2d Cir. June 14, 2022) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, he must show (1) good cause to excuse the default and ensuing prejudice, or (2) actual innocence.") (citation and internal quotation marks omitted). Defendant does not purport to rely on the actual innocence exception, and any attempt by him in that regard would be unavailing in any event.

("[A] petitioner must show both that (1) his counsel's performance was deficient in that it was objectively unreasonable under professional standards prevailing at the time, and that (2) counsel's deficient performance was prejudicial to the petitioner's case.").

> Under the first prong of the *Strickland test*, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. There is a "strong presumption" that defense counsel's conduct falls within the broad spectrum of reasonable professional assistance, and a petitioner "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986); *see also Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential.").
>
> In order for a defendant to prove prejudice under the second prong of the *Strickland* test, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.... 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." *Strickland*, 466 U.S. at 693-94.

Marston v. United States, 2020 WL 6701014, at *3.

As indicated above, the analysis under the first *Strickland* prong is deferential to counsel, such that

> "[a]ctions or omissions by counsel that might be considered sound trial strategy do not constitute ineffective assistance." *Mason v. Scully*, 16 F.3d 38, 42 (2d Cir.1994) (citation and internal quotation marks omitted). Moreover, when reviewing decisions by counsel, we are instructed not to "second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim." *Jones v. Barnes*, 463 U.S. 745, 754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Acevedo v. Capra, 600 F. App'x 801, 803 (2d Cir. 2015); *see also, Carmichael v. Chappius*, 811 F. App'x 41, 43 (2d Cir. 2020) ("A court must make allowances for counsel's strategic choices and apply 'a heavy measure of deference to counsel's

judgments.'" [*Strickland*, 466 U.S.] at 691, 104 S.Ct. 2052.").

Moreover, the showing under the second *Strickland* prong must be substantial, taking into consideration the strength of the prosecution's case:

> To establish *Strickland* prejudice, [the defendant] must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. That is, [the defendant] must show that he was "deprive[d] ... of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. 2052; *see also [Harrington v.] Richter*, 562 U.S. [86,] 111, 131 S.Ct. 770 [(2011)] ("*Strickland* asks whether it is 'reasonably likely' the result would have been different." (quoting *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052)). "[T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently"; instead, "[t]he likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 111–12, 131 S.Ct. 770 (emphasis added); *see also Strickland*, 466 U.S. at 693, 104 S.Ct. 2052 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." (internal citation omitted)).
>
> The prejudice analysis should also "be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052). The prejudice inquiry is therefore ineluctably tied to the strength of the prosecution's evidence. "[A] verdict or conclusion with ample record support is less likely to have been affected by the errors of counsel than 'a verdict or conclusion only weakly supported by the record.'" *Waiters [v. Lee]*, 857 F.3d [466,] 480 [(2d Cir. 2017)] (quoting *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052). As a result, "[e]ven serious errors by counsel do not warrant granting habeas relief where the conviction is supported by overwhelming evidence of guilt." *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001).

Garner v. Lee, 908 F.3d 845, 861–62 (2d Cir. 2018).

Since a defendant is required to establish both *Strickland* prongs to prevail, a court is not required to consider both prongs where it is evident that the defendant cannot meet a particular prong:

> A court has flexibility in how it decides a claim of ineffective assistance. "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." [*Strickland*, 466 U.S.] at 697, 104 S.Ct. 2052. Consequently, if a defendant does not successfully establish either the performance prong or the prejudice prong, the ineffective assistance claim fails, and the remaining prong becomes moot. *See id.*

Carmichael v. Chappius, 811 F. App'x at 43–44.

Returning to the question of whether Anson has shown that the failure to raise Grounds Two, Eleven and Fourteen on appeal was caused by ineffective assistance of counsel, the Court notes that to demonstrate deficient performance of an appellate attorney under the first *Strickland* prong, a defendant may show "that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Whitman v. United States*, 754 F. App'x 40, 43 (2d Cir. 2018) (quoting *Lynch v. Dolce*, 789 F.3d 303, 311 (2d Cir. 2015), internal quotation marks omitted). However, Defendant has not made such a showing, and, instead, merely asserts, in essence, that his appellate attorneys were ineffective insofar as they did not raise every issue that that he wanted raised.[8] To the extent Defendant alleges other errors by appellate counsel,

[8] The Court notes that Defendant's first appellate attorney raised twenty-one separate issues, causing the Second Circuit to remark that Defendant had "left no stone unturned" in his appeal. *See, Anson I*, 304 F. App'x at *2 ("Anson raises twenty-one issues on appeal that we group into ten thematic categories."); *see also, id.* ("Leaving no stone unturned, Anson also contends that ..."). The second appeal was based on appellate counsel's brief and Defendant's own *pro se* supplemental briefs. *See, Anson II*, 429 Fed.Appx. at *62 ("We have two sets of appellant briefs to consider-Anson's court-appointed lawyer's briefs, and Anson's *pro se* briefs."). In the third appeal, assigned counsel submitted a brief and the Second Circuit denied Anson's request to submit a *pro se* supplemental brief.

they similarly do not rise to the level of deficient performance required to satisfy the first *Strickland* prong. Consequently, the Court finds that Defendant has not demonstrated that his procedural default was caused by ineffective assistance of counsel, and Grounds Two, Eleven and Fourteen are denied as procedurally barred.

The Court further would find that the claims lack merit in any event. For example, Defendant has not established a *Brady* violation (Ground Two) involving the forensic report, since he has not shown that the report was likely favorable to him or that he was prejudiced by not having the report.[9] *See, United States v. Alston*, 899 F.3d 135, 147–48 (2d Cir. 2018) ("*Brady* violations have three elements: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)."). Moreover, the allegations in Ground Fourteen, alleging that the prosecutor and this Court misled the jury concerning evidentiary and chain-of-custody issues, are simply false as shown by the record. Ground Eleven, which vaguely alleges that Defendant's defense was harmed by the Marshal's Service loss of three unspecified letters that would have established Defendant's innocence, similarly lacks merit as a Section 2255 claim.

The Remaining Grounds Alleging Ineffective Assistance of Counsel Lack Merit

The remaining claims allege ineffective assistance of counsel.[10] Ground Three

[9] As indicated, the primary reason why Defendant wanted the report was to show that he did not upload child pornography using his OSC account, but there is no indication that the report supports that claim and, in any event, he admitted that he uploaded the images.

[10] "A claim of ineffective assistance of counsel may be raised for the first time in a § 2255 motion 'whether or not the petitioner could have raised the claim on direct appeal.'" *Whitman v. United States*, 754 F. App'x 40, 43 (2d Cir. 2018) (quoting *Massaro v. United States*, 538 U.S. 500, 504, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003)).

alleges ineffective assistance based on counsel's failure to raise Speedy Trial Act and constitutional speedy trial issues;[11] Ground Four alleges ineffective assistance based on counsel's failure to obtain the Sago Networks forensics report;[12] Ground Six alleges ineffective assistance based on counsel's failure to assert a Fourth Amendment violation arising from the alleged late execution of the search warrant;[13] Ground Seven alleges ineffective assistance based on counsel's failure to advise petitioner that he could procure an expert witness through the Criminal Justice Act;[14] Ground Eight alleges ineffective assistance based on counsel's performance during trial;[15] Ground Nine alleges ineffective assistance based on counsel's performance in connection with a Rule 29(c) motion;[16] Ground Ten alleges ineffective assistance based on counsel's handling of pre-trial motions;[17] and Ground Twelve alleges ineffective assistance based on appellate counsel's failure to argue issues pertaining to the PSR.[18]

---

[11] Defendant alleges that the Assistant Federal Public Defender assigned to his case "lied" to him about the Speedy Trial Act, inappropriately requested exclusions based on counsel's crowded trial schedule, and failed to challenge exclusions for the period when Defendant had absconded to Florida.

[12] Defendant maintains that if his attorney had obtained the forensic report he could have used it to prevail at the suppression hearing.

[13] Defendant complains that the prosecutor and court essentially conspired to fabricate a basis to extend the search deadline in the search warrant, and that his attorney failed to file a motion advancing this theory.

[14] Defendant asserts that counsel should have informed him about the possibility of retaining a computer expert since it might have been useful at trial to have one.

[15] Defendant alleges that trial counsel did not adequately review the prior testimony of witnesses, failed to properly cross-examine witnesses, failed to ask questions that Defendant requested, failed to retain an expert, and failed to inform the jury of the "true" reason Defendant claims to have absconded to Florida--to search for the person who allegedly used Defendant's OSC password to upload child pornography.

[16] Defendant alleges that his attorney lied to him about the content of the Rule 29 motion, failed to raise issues that Defendant had requested and lied to the court about the reasons why Defendant declined to appear at the first re-sentencing.

[17] Defendant alleges that his attorney filed pretrial motions "that he knew Defendant disagreed with" and misled him about a matter relating to his property.

[18] Defendant alleges that in his final appeal, following the second re-sentencing, counsel declined to raise issues that Defendant had raised in his objections to the PSR, which the Court had declined to expressly rule upon since they had no effect on the sentence imposed.

Applying the relevant standards for ineffective assistance claims set forth earlier, Defendant has not established his entitlement to relief under *Strickland* as to any of the remaining claims. In that regard the analysis can begin and end on the second *Strickland* prong, since Defendant cannot demonstrate constitutionally-significant prejudice from the alleged errors by counsel, given the overwhelming strength of the Government's case against him. Having presided over the trial, and having reviewed the record and appellate rulings, it is the Court's view that there is no reasonable probability that the errors Defendant has alleged, either singly or in combination, would have made any significant difference in the outcome of his trial or appeals.[19]

The Court additionally finds that Defendant has also not made the required showing under the first *Strickland* prong. For example, several of Defendant's arguments on this point relate to counsel's alleged failure to pursue issues that the Second Circuit and/or this Court have already found to be unmeritorious, *e.g.*, Grounds One, Two, Five, Thirteen and Fourteen. *See, Harrington v. United States*, 689 F.3d 124, 130 (2d Cir. 2012) ("Failure to raise meritless objections is not ineffective lawyering; it is the very opposite.") (quoting *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir.1994)). The remaining grounds essentially amount to Defendant's disagreement with counsel over matters of professional judgment and strategy, such as whether to retain an expert. *See, e.g., Cosey v. Lilley*, 460 F. Supp. 3d 346, 379 (S.D.N.Y. 2020) ("The failure to consult expert testimony regarding the manner of Williams's death before the petitioner pleaded guilty was not objectively unreasonable. The decision to call or not call witnesses is generally a tactical decision. *See United States v. Luciano*, 158 F.3d 655, 660 (2d Cir. 1998).").

[19] Defendant's first two appeals were successful, and the third appeal was denied for reasons having no connection to counsel's performance.

CONCLUSION

The application under 28 U.S.C. § 2255 (ECF No. 288) and the remaining related pending applications (ECF Nos. 302, 305, 306) are denied. Pursuant to 28 U.S.C. § 2253, the Court declines to issue a certificate of appealability, since Defendant has not made a substantial showing of the denial of a constitutional right. The Court hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith and leave to appeal to the Court of Appeals as a poor person is denied. *Coppedge v. United States*, 369 U.S. 438 (1962). Further requests to proceed on appeal *in forma pauperis* should be directed on motion to the United States Court of Appeals for the Second Circuit in accordance with Rule 24 of the Federal Rules of Appellate Procedure. The Clerk of the Court is directed to close this case.

So Ordered.

Dated: Rochester, New York
June 27, 2022

ENTER:

Charles J. Siragusa

CHARLES J. SIRAGUSA
United States District Judge