APPENDIX A

UNITED STATES OF AMERICA V. ROBERT TIMOTHY BLAKE

22-51054 ,Doc:00516695463 . 03/30/2023 .

Appendix A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 30, 2023
Lyle W. Cayce
Clerk

No. 22-51054

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROBERT TIMOTHY BLAKE,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 5:18-CV-994
USDC No. 5:15-CR-66-1

ORDER:

Robert Timothy Blake, federal prisoner # 46959-380, is serving consecutive 262-month and 22-month sentences for distribution of child pornography and possession of child pornography, respectively. Blake seeks a certificate of appealability to appeal the district court's denial of his 28 U.S.C. § 2255 claim following our decision granting a certificate of appealability, vacating and remanding for an evidentiary hearing, on whether counsel incorrectly advised Blake of the likely penalty he would face if he accepted the plea agreement. Blake argues that the district court erred in its adverse credibility

determination following the evidentiary hearing. Blake further argues that he sufficiently proved that counsel's failure to explain the Guidelines and counsel's erroneous advice that he would likely receive a sentence of probation or a light sentence upon pleading guilty amounted to ineffective assistance.

To obtain a certificate of appealability, Blake must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Blake has failed to make the requisite showing.

In addition, for the first time on appeal, Blake argues that counsel rendered ineffective assistance by failing to investigate and provide him with evidence prior to his guilty plea, as well as that the transcript of the evidentiary hearing was modified to exclude significant and relevant testimony. We do not consider these claims because they are raised for the first time on appeal. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018).

Accordingly, Blake's request for a certificate of appealability is DENIED. His request to proceed *in forma pauperis* is DENIED AS MOOT.

Jennifer Walker Elrod

JENNIFER WALKER ELROD
United States Circuit Judge

APPENDIX B

UNITED STATES OF AMERICA V. ROBERT TIMOTHY BLAKE

22-51054. Doc:44-2. 05/23/2023.

Appendix B

United States Court of Appeals for the Fifth Circuit

No. 22-51054

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROBERT TIMOTHY BLAKE,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:18-CV-994

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

UNPUBLISHED ORDER

Before ELROD, GRAVES, and HO, *Circuit Judges.*

PER CURIAM:

The motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

Appendix B

APPENDIX C

UNITED STATES OF AMERICA V. ROBERT TIMOTHY BLAKE
5:15-cr00066-XR, Doc.198. 11/21/2022.

 11-21-22

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Appendix C

ROBERT TIMOTHY BLAKE, #46959-380	§	
Movant,	§	**SA-18-CV-994-XR**
	§	**SA-15-CR-066-XR-1**
v.	§	
UNITED STATES OF AMERICA,	§	
Respondent.	§	

ORDER (11)

Before the Court is Movant Robert Timothy Blake's *pro se* Motion pursuant to 28 U.S.C. § 2255 ("Section 2255 Motion") to vacate, set aside, or correct his sentence (ECF No. 93); the Government's Response in opposition thereto (ECF No. 96); Blake's Reply (ECF No. 103); Blake's Supplement (ECF No. 104); the Government's Response to the Supplement (ECF No. 108); Blake's Reply to the Government's Response to the Supplement (ECF No. 112); Blake's post-hearing Brief in Support of Motion for Relief under 28 U.S.C. § 2255 (ECF No. 188); the Government's Response to the Brief (ECF No. 192); the Report and Recommendation of the United States Magistrate Judge (ECF No. 194); and Blake's Objections to the Report and Recommendation. (ECF No. 197).

This case is before the Court following a remand from the Fifth Circuit Court of Appeals. In 2018, Blake filed a Section 2255 Motion challenging his conviction and sentence on grounds that trial counsel provided ineffective assistance, including by erroneously advising Blake that he was likely to receive a sentence of probation or a very light prison sentence if he were to plead

guilty. The Court denied the Section 2255 Motion and denied a certificate of appealability on all grounds. (ECF No. 118).

Blake appealed the Court's order, and the Fifth Circuit determined that the Court erred by denying without holding an evidentiary hearing Blake's claim that his counsel was ineffective for incorrectly advising him that he was likely to receive probation or a very light prison sentence if he were to plead guilty. (ECF No. 134). The Fifth Circuit vacated the Court's order and remanded the case only with respect to Blake's claim of ineffective assistance of counsel during plea negotiations. Central to the remand was the need to resolve the conflicting testimony provided by Blake's former wife, testimony provided by Blake's plea counsel, Jaime Cavazos, and statements Blake made regarding the entry of his guilty plea. The Fifth Circuit noted that "the credibility determinations required to resolve conflicting testimony are precisely what an evidentiary hearing is intended to facilitate." (*Id.* at 4). (10)

Upon remand, the Court referred the matter to United States Magistrate Judge Richard B. Farrer for the purpose of holding an evidentiary hearing and submitting a report and recommendation as to the unresolved ineffective assistance of counsel claim. (ECF No. 139). Judge Farrer appointed counsel to assist Blake with the evidentiary hearing and held an evidentiary hearing on February 25, 2022. (ECF Nos. 141 & 177). At the hearing, Judge Farrer heard testimony from Blake, his former wife, his uncle, and Cavazos. Blake filed a post-hearing brief, to which the Government filed a response. (ECF Nos. 188 & 192).

Judge Farrer then entered the pending Report and Recommendation recommending that Blake's Section 2255 Motion be denied. (ECF No. 194). In the Report and Recommendation, Judge Farrer set forth in great detail the evidence contained in the record, including the relevant witness testimony from the evidentiary hearing. In applying the standard set forth in *Strickland v.*

Washington, 466 U.S. 668 (1984), Judge Farrer concluded that no credible evidence reflects that counsel's performance was deficient and that Blake fails to show prejudice.

Judge Farrer determined that Blake's testimony at the evidentiary hearing in support of his claim was unreliable and incredible, whereas Cavazos's testimony was clear, consistent, forthright, and credible. Judge Farrer further concluded that the written statements and hearing testimony provided by Blake's former wife and Blake's uncle do not materially assist Blake's Section 2255 Motion because those witnesses "appeared confused or as though they were acting with incomplete information about the charges against Blake and the penalties he faced." (ECF No. 194 at 16).

Judge Farrer additionally concluded that Blake's hearing testimony was further undermined by: 1) Blake's signed, written plea agreement; 2) Blake's plea colloquy; 3) Cavazos's credible, sworn testimony; and 4) internal inconsistencies in Blake's testimony or between Blake's testimony and that of his witnesses. Regarding prejudice, Judge Farrer concluded that the contemporaneous evidence reflects that no reasonable person would have chosen a trial over a guilty plea.

The Court has considered Blake's objections, and, in light of those objections, the Court has undertaken a *de novo* review of the entire case file. After thoroughly reviewing Judge Farrer's conclusions and the underlying facts of this case, including the pleadings from both sides, this Court agrees with the factual and legal conclusions made by the Magistrate Judge. Accordingly, the Court overrules Blake's objections and adopts the Report and Recommendation in full.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2255 Proceedings,

the District Court must issue or deny a certificate of appealability when it enters a final order adverse to the movant.

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where the Court rejects a movant's constitutional claims on the merits, "the [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

In this case, reasonable jurists could not debate the denial of Blake's Section 2255 Motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Thus, a certificate of appealability shall not be issued.

Accordingly,

IT IS ORDERED that the Report and Recommendation of the United States Magistrate Judge (ECF No. 194) is **ACCEPTED AND ADOPTED**.

IT IS FURTHER ORDERED that Movant Robert Timothy Blake's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (ECF No. 93) is **DENIED**.

IT IS FURTHER ORDERED that all pending motions, if any, are **DISMISSED AS MOOT**, and this case is now **CLOSED**.

FINALLY, IT IS ORDERED that a certificate of appealability is **DENIED**.

SIGNED on this 21st day of November, 2022.

Xavier Rodriguez
United States District Judge

APPENDIX D

UNITED STATES OF AMERICA V. ROBERT TIMOTHY BLAKE

Doc: 194 . 10/13/2022. R & R .

#194

Document # 194 10/13/2022/ Court is to provide File Copy to Blake.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Appendix D

ROBERT TIMOTHY BLAKE,
46959-380

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

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5-18-CV-00994-XR
5-15-CR-00066-XR (1)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

To the Honorable United States District Judge Xavier Rodriguez:

This Report and Recommendation concerns the limited referral from the District Court, *see* Dkt. No. 139 (order of referral), relating to the Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, *see* Dkt No. 93 (motion to vacate), filed by Movant Robert Timothy Blake. Following a remand from the Fifth Circuit, the District Court referred this matter for the limited purpose of "holding an evidentiary hearing and submitting a report and recommendation as to Blake's claim that [his retained] counsel was ineffective for incorrectly advising him that he was likely to receive probation or a very light prison sentence if he were to plead guilty." Dkt. No. 139; *see* 28 U.S.C. § 636(b)(1)(B).

Having conducted the requisite evidentiary hearing and for the reasons set forth below, it is recommended that Blake's Motion to Vacate, Dkt. No. 93, be **DENIED**.

Background

The charges and Blake's guilty plea. On January 6, 2015, the Government charged Robert Timothy Blake by criminal complaint, alleging receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2). Dkt. No. 3. Blake, however, first learned he was under investigation about

a month before the Government lodged these charges, when FBI agents executed a search warrant at his home and questioned him. Dkt. No. 185 (transcript of the evidentiary hearing held on February 25, 2022, hereinafter referred to as "Tr.") at 10:5-6. Approximately a month after the filing of the complaint, a grand jury returned a 5-count indictment charging Blake with the following: Count 1 -- distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2) and (b); Count 2 -- receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2) and (b); and Counts 3-5 -- possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). *See* Dkt. No. 15. Blake, through counsel, filed a motion to suppress statements he made to law enforcement as well as evidence obtained directly or indirectly because of those statements. *See* Dkt. No. 23. The District Court held a hearing on the suppression motion and ultimately denied it in a written order dated April 2, 2015. Dkt. Nos. 31 & 32.

Blake signed a written plea agreement on January 5, 2016, and two days later, on January 7, he pleaded guilty on Counts 1 and 3 pursuant to that written plea agreement. *See* Dkt. No. 41. On June 29, 2016, the District Court sentenced Blake to a within-guidelines term of 262 months in prison, comprised of 240 months on Count 1 and 22 months on Count 3, to be served consecutively. Dkt. No. 63. At the sentencing hearing, Blake, through counsel, successfully removed a 5-level enhancement to his guidelines range for engaging in a pattern of activity. This adjusted his guidelines range from the original 360 to 480 months down to the 210 to 262 months ultimately used by the District Court. *See id.*; *see also* Dkt. No. 59; Tr. 157:20-24.

Appeal and motion to vacate. After his sentencing, Blake retained new counsel and appealed his conviction and sentence. *See* Dkt. Nos. 66 (*pro se* Notice of Appeal) & 68 (counseled Notice of Appeal). At no point did Blake seek to withdraw his guilty plea. The Fifth Circuit dismissed Blake's appeal, noting that in executing his plea agreement Blake knowingly and

voluntarily waived his right to appeal on all claims barring those for ineffective assistance of counsel and prosecutorial misconduct. *See* Dkt. No. 97.

Blake then pursued his present *pro se* § 2255 motion to vacate. *See* Dkt. No. 93. In it, Blake challenges his conviction and sentence on grounds that trial counsel provided ineffective assistance, including by incorrectly advising him that he was likely to receive probation or a very light prison sentence if he were to plead guilty. In a reply filed in support of the motion, Blake argued for the first time that he is innocent of the child-pornography distribution charge (Count 1) to which he pleaded guilty. Dkt. No. 103. The District Court initially denied the § 2255 motion and denied a certificate of appealability on all issues. Dkt. No. 118 (order). Blake challenged those denials on appeal, and the Fifth Circuit determined the District Court "erred in denying without holding an evidentiary hearing Blake's claim that his counsel was ineffective for incorrectly advising him that he was likely to receive probation or a very light prison sentence if he were to plead guilty." Dkt. No. 139; *see also* Dkt. Nos. 134 & 138. Central to the Fifth Circuit's decision was an apparent conflict between, on one hand, statements by Blake and his then ex-wife concerning advice he received from counsel and, on the other hand, counsel's statements as well as information in the plea agreement and Blake's statements in open court. Dkt Nos. 134 & 138. The Fifth Circuit denied a certificate of appealability for all other claims. *Id.*

Following the Fifth Circuit's ruling, the District Court referred the § 2255 motion to this Court for purposes of conducting an evidentiary hearing and providing a report and recommendation on Blake's sole remaining ineffective-assistance-of-counsel claim. The Court appointed counsel to assist Blake with the evidentiary hearing and provided Blake and his newly appointed counsel ample time to investigate and discuss the matter. The Court also conferred on several occasions with counsel for Blake and the Government regarding various procedural matters in connection with the remanded proceedings. The Court then held an evidentiary on February 25,

2022, as directed by the Fifth Circuit and the District Court. The Court permitted Blake to file a post-hearing brief, which he did. *See* Dkt. No. 188. The Government filed a post-hearing response. *See* Dkt. No. 192; *see also* Dkt. Nos. 96 (Government's Response to § 2255 Motion to Vacate) & 108 (Government's Second Response to § 2255 Motion to Vacate).

The record before the Court. The record in connection with Blake's present motion includes the § 2255 motion to vacate, various responses and replies to that motion, witness statements, hearing testimony, and some additional matters about which the Court takes judicial notice. Blake and his ex-wife Deborah Warren Blake provided written statements in support of the § 2255 motion. *See* Dkt. Nos. 93 (Blake's § 2255 motion that includes statements from Blake), 103 (Blake's reply to the Government's response to his § 2255 motion), & 103-1 (affidavit of Deborah Warren Blake). At the hearing, the Court heard testimony from Blake, his ex-wife Deborah Warren Blake, his uncle James Dyson, and his former counsel Jaime Cavazos. Other documents in the record and about which the Court takes judicial notice include the case docket in general and the specific matters filed on it, including the criminal complaint, Dkt. No. 5, written plea agreement, Dkt. No. 41, transcript of the plea hearing before the District Court, Dkt. No. 72, the presentence investigation report as well as revisions to it, Dkt. Nos. 56-59, the transcript of the sentencing hearing, Dkt. No. 73, and the transcript of the evidentiary hearing held on February 25, 2022, Dkt. No. 185 (cited herein as "Tr.").

The evidentiary hearing: Initial consultation with Cavazos. The February 25 hearing began with Blake's testimony that he contacted attorney Cavazos "the same day" agents executed a federal search warrant at his home. Tr. 10:5-6. Blake and Debra Warren Blake (hereinafter "Warren"), who was Blake's wife at the time, met Cavazos together that same day. Tr. 80:14-16, 93:24-25. This was the *only* time during the course of Cavazos's representation of Blake that Warren was present when Blake met with Cavazos. Tr. 111:4-8. At this initial consultation, which

occurred about a month before Blake was arrested or charged, *see* Tr. 50:12-18, 16:5-6, Blake explained to Cavazos "that [the FBI] were investigating charges of possession of child pornography." Tr. 11:8-13. Blake did not discuss with Cavazos any investigation or allegations of *distribution* or *receipt* of child pornography. *Id.* At this initial consultation, according to Blake, Cavazos estimated "the punishment may be probation or time served." Tr. 54:10-23. The following exchange between Blake and the Government's attorney at the evidentiary hearing confirms that the initial consultation involved, according to Blake, only at most Cavazos's estimate for a possible sentence based on only *possession*-of-child-pornography charges:

> Q. What did you tell Mr. Cavazos in that first meeting about what you thought the charges would be? Because at that time no charges had been filed against you, correct?
> A. Not that I know of.
> Q. What did you tell him you thought the charges would be?
> A. I told him that the agents were looking for child pornography.
> Q. And did you tell him that they would find it?
> A. I told him that I've seen it, and it had come through my emails, and it's possible that there was material that had not been deleted.
> Q. And that's when he told you that, based on what you had told him, the punishment may be probation or time served?
> A. Yes.

Tr. 54: 10-23, 81:9-11 (testimony from Warren reflecting she was not aware during the initial consultation that Blake was being investigated for receipt and distribution of child pornography), 83:23-84:1 (Warren noting that Cavazos was "quite confident in his assessment that the likely outcomes would be -- with the charges as we understood them at the time, possession would be probation").

Blake repeatedly maintained throughout his February 25 testimony that right up until his sentencing he believed Cavazos's initial estimate for a potential sentence remained valid. Warren conceded on cross examination, however, that Cavazos in subsequent conversations with her

amended his initial estimate to include additional significant prison time based on the charges ultimately brought:

> Q. And what did Mr. Cavazos say that these charges – these more serious charges meant for a possible sentence for Robert?
> A. Yes. So, eventually, when there was clarity that there were additional charges around . . . when all was said and done, our understanding was that Robert would serve no more than seven years total, with the potential of nine years at the absolute most . . . .

Tr. 92:14-24. Warren discussed these same possible outcomes with Blake in her separate conversations with him, and in those conversations she and Blake discussed a possibility of a nine-year sentence as a "worst-case scenario." *See* Tr. 98:13-17 ("And the nine-year mark was just what Robert and I had discussed amongst ourself, expecting that – worst case scenario essentially. . . . So we thought, well, if he's thinking seven years, let's plan for nine, that that was a potential.").

Cavazos also testified at the February 25 hearing concerning this early phase of the representation and the initial consultation he had with Blake and Warren. Cavazos explained has been a criminal lawyer for about 28 years. Tr. 138:20-21. He has handled hundreds of cases. He testified recalling Blake and Warren's visit to his office, and their preliminary discussions about the case. At that point, Blake had explained that the FBI was at his house because of "child pornography images . . . in his computer." Tr. 141:4-7. Cavazos recalled that he spoke in "general terms" with Blake and Warren "because [he] didn't have anything specific in front of [him]." Tr. 142:4-5. He had the search warrant

The evidentiary hearing: Initial appearance and arraignment. Blake testified at the February 25 hearing that in connection with his initial appearance he did not receive a copy of the criminal complaint charging him with receipt of child pornography and listing a sentencing range of five to 20 years. Tr. 18:2-4 (Blake responding, "I don't remember. No, I don't think so" when asked if he received a copy of the complaint at the initial appearance); Tr. 19:2-5 (Blake testifying

that he "never saw the criminal complaint until I ordered it from the court and when I was in BOP," which was "[w]ay after" he had been sentenced.). The Court's minutes for the initial appearance reflect, however, "Defendant [was] informed of and received copy of charging document. Violation: **18 U.S.C. 2252(a)(2)**" and "Defendant [was] informed of maximum penalty: **5 to 20 years imprisonment, $250,000 fine; lifetime supervised release; $100 special assessment and restitution.**" Dkt. No. 7 (emphasis in original). Warren didn't recall being present at the initial appearance, Tr. 108:16-18, and Blake's other witness at the February 25 hearing, Mr. Dyson, wasn't present either; he only became involved much later, *e.g.*, Tr. 124:18-20. Cavazos, in contrast, testified that he recalled the Court providing a copy of the complaint to Blake at the initial appearance. Tr. 143:11-13. Cavazos further confirmed that the complaint listed the statutory minimum 5-year penalty on page 1, as well as a maximum penalty of 20 years. 143:22-144:1. Cavazos also recalled that he discussed with Blake at some point in the representation Blake's statements to FBI agents in which Blake admitted to the FBI that he received emails containing child-exploitation material, that Blake initially claimed the emails were unsolicited, and that Blake later confirmed that they were, in fact, solicited by him. 144:15-23.

Blake testified at the February 25 hearing to a continuing lack of information prior to his arraignment. According to Blake, he and Cavazos only discussed a *possession* charge prior to the arraignment and "didn't discuss the others." Tr. 20:9-10. Although Blake acknowledged that Cavazos had, prior to the arraignment, "explained . . . that the formal charges had been filed against" him, Tr. 19:15-18, their discussions, according to Blake, didn't involve any charges other than those for possession of child pornography. Tr. 20:9-10 ("We didn't discuss the others."). Although Cavazos showed Blake the indictment at the arraignment, Blake—according to his testimony at the hearing—merely "looked it over," and although "he could have read it," he instead merely "looked it over and handed it back to [Cavazos]." Tr. 20:13-15.

Cavazos, however, explained that once the complaint had been filed, he did in fact discuss with Blake punishment ranges as well as the Government's evidence:

> A. Once this criminal complaint was put out and then the indictment that followed, we began to talk specifics about punishment ranges and consequences and the evidence that the government had against him.
>
> His admissions were concerning. I then focused on facts or circumstances that would warrant a suppression motion, which, in fact, I did file in this case.

Tr. 145:2-8. Cavazos also explained that he went over the indictment with Blake, as is his customary practice, and he did so "one page at a time to make sure that everything is understood before the next page is addressed." Tr. 146:7-10.

> Q. But you recall going over it [the indictment] with him?
> A. Yes.
> Q. Page by page?
> A. Yes.
> Q. Did he appear to understand the contents of it?
> A. Mr. Blake is a very intelligent man, yes. And he had plenty of opportunities to ask questions if he had any questions to ask.
> Q. Did you -- at that time do you recall if you went over the increased penalties that he would be facing based on the fact that there were five charges?
> A. Yes. I believe I did.

Tr. 146:16-147:2.

The evidentiary hearing: Plea negotiations. As Blake and Cavazos contemplated a plea agreement, Blake, according to his February 25 recounting of events, continued to believe he faced only the prospect of a light sentence, perhaps even one for time served. Tr. 23:18-20 ("By pleading guilty, I understood that, like I understood all along, I had opportunity to have time served and go home at that point. And I was already there for a year."). During discussions with Cavazos about a guilty plea, Blake testified, Cavazos didn't revisit his initial assessment regarding a possible sentence and, indeed, "it didn't come up again." Tr. 23:12, *see* Tr. 24:20-23 (Blake's counsel asking Blake if during conversations about the plea agreement Cavazos "never corrected your understanding that you could receive probation in the case?" and Blake responding, "No."). But

they did discuss the "the charge of distribution and the five-year minimum that was listed in the plea agreement," Blake acknowledged. Tr. 27:16-18. And following a disagreement about the factual basis and distribution charge in the plea agreement, Cavazos left and promised to continue negotiations with the government about the plea agreement. Tr. 27:16-25. But then, according to Blake, Cavazos later returned and explained that "the government refused to make any changes." Tr. 28:10.

Blake ultimately signed the plea agreement offered by the Government. At the February 25 hearing, Blake testified initially on direct examination that he only "flipped through the pages" of the agreement before signing it and pleading guilty. Tr. 30:4. But on cross-examination Blake conceded he had in fact read the plea agreement in its entirety. Tr. 57:9-11 (Responding "Yes" to the question, "Before you pled guilty, did you read through your plea agreement?"); 48:11-12 (answering in the affirmative to the question, "you read it in its entirety?").

Blake testified at the February 25 hearing that before signing the plea agreement he and Cavazos had a substantial disagreement about portions of the agreement's factual basis and, further, that Blake at that time continued to believe Cavazos's initial penalty assessment remained valid:

> Q. Okay. And when you decided to plead guilty, what was your idea as to the possible punishment you were facing?
> A. I thought I would go home.
> Q. And that's based on what information?
> A. What I believed all along based off of our first meeting.

Tr. 40:16-20, 23:18-20. Indeed, Blake testified that Cavazos (1) "didn't elaborate" about the "possible punishment" Blake was facing, Tr. 23:3-5, (2) didn't clarify Blake's initial punishment assessment provided at the first meeting conducted before Blake had been arrested or charged, Tr. 23:9-15, (3) "never"—in two meetings Blake and Cavazos had to discuss a plea agreement—"corrected [Blake's] understanding that [he] could receive probation in the case," Tr. 24:20-23,

and (4) told Blake when discussing the proposed plea agreement that the mandatory statutory minimum of five years could "be removed" and was "flexible." Tr. 31:17-19, 32:6-7; *see also* Tr. 33:6-8 (Blake noting that the plea agreement uses the word "could" when speaking about the mandatory minimum and concluding "[t]hat means it can change.").

The evidentiary hearing: Sentencing guidelines. Blake initially maintained that Cavazos never went over the sentencing guidelines with him and how they might apply to his case. *See, e.g.*, Tr. 39:11-21, 42:16-21 (Blake testifying that he asked Cavazos after the plea hearing, "I asked him, I said, you know, what does he mean about 'within the guidelines'? And he told me not to worry about that."), 64:19-21. But Warren indicated that Cavazos discussed the sentencing guidelines during even the initial consultation:

> At that time we had asked specifically what he [Cavazos] thought the sentencing would look like. And based on what he [Cavazos] explained to us were the guidelines for such an offense, it would be a few years. And so that would either mean that Robert would be serving time -- a few years of time between arrest and sentencing, and he would then be not serving any more time besides time served, or there would be probation.

Tr. 84:10-16. During this initial meeting, Warren testified, Cavazos indicated that the "guidelines would dictate" a sentence and a likely outcome for a guilty plea would be "a couple of years." Tr. 85:15-17. Somewhat contradicting her earlier time-served and probation statements, Warren also indicated at this point in the hearing that a "five-year range" was expressed. Tr. 85:18-19. But this was all "day one," in her words, and "this was prior to Robert even being arrested." 86:1-2. Later on, Warren testified, Cavazos shared information from a sentencing table with her, albeit without Blake being present. Tr. 89:16-17.

Blake also maintained at the hearing that both before and after he signed the plea agreement, he didn't understand how the sentencing guidelines could apply in his case.

A. . . . . I asked him [Cavazos], you know, what is guidelines?

And he explained to me that there will be a criminal history, and you'll actually be scored as a one even though you don't have a criminal history. So he wanted me not to be worried about that.

And then he told me that the guidelines are formal rules that the Court follows to determine my sentence.

Q. Did he . . . explain anything else other than that?

A. No.

Tr. 38:13-23. Blake reinforced this notion repeatedly at the February 25 evidentiary hearing. For example, he testified as follows:

Q. At the time that you signed the plea agreement, did your attorney give you an estimate of how the guidelines apply in your case?

A. No.

Q. Did your attorney give you an estimate of the sentencing imprisonment range that you were facing based on the sentencing guidelines?

A. No.

Q. Okay. Were you shown a sentencing table, as to how those calculations are --

A. No. I don't recall, no.

Tr. 39:11-21.

But in a lengthier exchange on cross-examination, Blake at first denied having gone over the guidelines with Cavazos but then acknowledged that he told the Court at his plea hearing that he had discussed the guidelines with Cavazos and how they might apply to him:

Q. Well, at the time of your plea, weren't you asked if your attorney had gone over the guideline range with you?

A. I believe -- I believe they said "guidelines." I don't -- I don't think they said "range."

Q. And you did understand how the guidelines work?

A. At the time -- my understanding at the time, from what I was told by my attorney, I didn't know any different. So I said, yes.

Q. Well, did he go over the guideline range -- did he go over the guidelines with you?

A. No.

Q. Ever?

A. He never went over a guideline range, no.

Q. Did he go over what the guidelines are?

A. Not specifically, no. He explained to me there was a criminal history, and guidelines are to guide the Court at sentencing. That's -- but that was my understanding.

Q. I'm sorry. I'm looking for the guideline part, because I think then you may have been less than candid with the Court.

The Court asked, "Have you spoken to your attorney about how the sentencing guidelines might apply in your case?"

And you answered, "Yes, Your Honor."

A. That's correct.

Q. Now you're saying that's not true?

A. He did tell me what he told me about guidelines.

Q. How they might apply in your case, how they apply to you in this case. That was the question. And you answered, yes. So was that true?

A. Yes. That's what I understood. I didn't know any different. I was told I would be looking at a criminal history of one.

Tr. 60:17-61:22.

For his part, Cavazos testified in plain terms that he went over the guidelines with Blake in significant detail:

Q. Do you recall discussing with Mr. Blake the guidelines?

A. Yes.

. . . .

A. I explained to him that these guidelines were what the judge would rely heavily on in determining his sentence. There was [sic] concerns because of the number of images associated with the evidence that they had. So I discussed that enhancement penalty associated with that.

We also discussed the enhancement that would be generated by the images of prepubescent children and also the images that depicted masochistic and violent acts. Will not explain [illegible] to the Question –

. . . .

Q. -- it sounds like what you're describing is the guidelines section for the child exploitation offenses and the base offense level and each enhancement?

A. Yes. The base level's usually – it's where I start.

Q. Okay.

A. And then, based on the information or the evidence that's there, I try to formulate what I anticipate the PSR may generate.

Q. Did you calculate an advisory guideline range in this case?

A. I believe I did.

Q. Do you remember what it was?

A. I don't recall specifically. But I do remember discussing with him the prepubescent one, the masochistic enhancement, the use of the computer enhancement, the number of images enhancement. I can't think of what else. I think at that point that may have been all that I discussed with him, if I recall.

No Mention of Distribution

Q. Do you recall whether or not you showed him the guidelines chart that's in the back of the guidelines book?

A. I have a laminated one that I -- that I have in my briefcase. And I've had it for years. And I usually put it up against the window when I'm talking to them so they can see it, or I slip it through so they can see it. And I talk about, you know, the

Attorney will Not say Yes.

criminal history axis versus the base level axis and where the sentencing range -- how the sentencing range is calculated.
Q. Given the list of enhancements that you just listed, including the pattern of activity enhancement, which came -- which will come in later and we'll get to, did you have a discussion with Mr. Blake about how significant the penalty could be for his offenses?
A. Yes. Yes. We did discuss that.
Q. Did he appear to understand that?
A. Yes, he did.
Q. Did he believe he was facing time served?
A. I don't know how he could have imagined that based on the conversations that we had. Still No Mention of Distribution or Guideline Calculation.

Tr. 147:3-149:4.

The evidentiary hearing: Plea and sentencing. When the topic of sentencing came up, Blake once again reiterated on direct examination at the February 25 hearing that prior to the sentencing hearing and up until he received his sentence, he still believed he would likely get a light sentence and perhaps get to go straight home:

Q. So when you went before the Court for sentencing, what was your idea of the possibility of punishment for these offenses?
A. I was under the impression that it wasn't going to be that hard. It was going to be a light sentence, possibly go home.

Tr. 43:12-15. Cavazos, in contrast, testified that "[a]ll along, during the course of my representation of Mr. Blake, that [the statutory mandatory minimum of five years] was a known fact." Tr. 150:17-18. Known by who? Blake was told it could change.

And on cross examination, Blake conceded that he agreed at his plea hearing, when asked by the Court, that he had read his plea agreement in its entirety, that he had been given ample opportunity to ask his attorney any questions he may have, and that he had spoken to his attorney about how the sentencing guidelines might apply in his case:

Q. Do you also remember the Court asking you if you read your plea agreement and understood it in its entirety?
A. Yes.
Q. And you answered, yes?
A. That's correct.

Q. And do you remember being asked if you were able to ask your attorney any questions that you had, and that you said, yes?
A. That's correct.
Q. Do you remember being asked if you had spoken with your attorney about how the sentencing guidelines might apply in your case? I was Not asked about a Calculated Guideline Range.
A. That's correct.
Q. Do you remember what your answer was?
A. I said, yes. To my Understanding at the time.

Tr. 49:6-20. He further acknowledged on cross that the Court advised him at the plea hearing of the sentencing range he faced:

Q. And the Court also, at the plea hearing, asked you about that and told you that you would be sentenced to no less than five years. Do you remember that?
A. I remember -- I remember that the Court said he could sentence me to no less than five years. The Court Said Could, - Not Would.
Q. You don't remember him saying you would be sentenced to no less than five years, and I could sentence you up to 20 years?
Do you understand?
To which your response was, yes, Your Honor?
A. Okay.

Tr. 48:18-49-2.

Cavazos testified that he went over every page of the plea agreement with Blake before Blake signed it, including the possible punishments at issue:

Q. Did you review the plea agreement with the defendant prior to him signing it?
A. Yes. My practice is to take a copy for the client to the GEO facility, provide him a copy, and we go over it one page at a time. And we don't go to the next page until all questions are addressed on whatever page we're on. So --
Q. And did you do that with Mr. Blake?
A. I do it with all my clients and, yes, I did it with Mr. Blake.
Q. On Page 2 there are the punishments. And Count 1 has a mandatory minimum of five years and a maximum of 20. Did you go over that with Mr. Blake?
A. Yes.
Q. Did he appear to understand that he could not be sentenced to less than five or more than 20 on that one count?
A. He had to have been. It was right there in front of him. We went over it, and we moved on to he [sic] signing the agreement. - Speculation - Attorney is Vauge.

Tr. 151:16-152:7.

And finally, Blake testified that at his sentencing he never voiced any confusion or objection to the contemplated 210-month to 262-month range discussed prior to the imposition of his sentence:

> Q. At the time of sentencing, when the guidelines are talked about with the Court, myself and your attorney, and the Court is talking about a range of 210 to 262 months -- do you remember that part of the sentencing?
> A. Oh, yes. The first time hearing these Numbers!
> Q. Did you ever interrupt anybody and say, wait a minute.
> That's not my understanding?
> A. No. I did not. I was told to Stay Quiet; by Cavazos.

Tr. 61:23-62-5. Cavazos's testimony mirrored this. He testified that in his opinion Blake understood he could be sentenced anywhere from five to 40 years. Tr. 156:19-21. He testified that he went over the presentence report page by page with Blake. Tr. 157:2-14. Not all Pages.

The evidentiary hearing: Testimony of James Dyson. Mr. Dyson, Blake's uncle, testified at the February 25 hearing that he "had multiple emails with Mr. Cavazos and three or possibly four conversations with him." Tr. 125:11-12. The majority of Mr. Dyson's three or four 20 to 30-minute conversations with Cavazos concerned efforts to rebut at sentencing allegations of abuse lodged by Blake's daughter. Tr. 125:21-126:9. Dyson was somewhat late in learning of Blake's predicament because Blake's "wife did not really want family to know all the specifics until after they had exhausted every opportunity to get things resolved." Tr. 124:13-17, Tr.124:13-22 (first involvement with the case in June of 2015). Mr. Dyson related at the February 25 hearing that he believed prior to sentencing that Blake faced a maximum five-year sentence, assuming allegations of abuse lodged by Blake's daughter could be rebutted at the sentencing hearing:

> The impression I had and the understanding I had was, by pleading guilty and if we were able to eliminate or at least prove that the daughter was not telling the truth, that the sentence would maximize at five.

Tr. 130:7-10. On cross examination, however, Mr. Dyson acknowledged that Mr. Cavazos "never said" that the maximum sentence Blake could get was five years. 134:12-14. And Mr. Dyson was never present during any conversations between Cavazos and Blake. *See* Tr. at 137:7-9.

Analysis

To warrant relief on a § 2255 motion to vacate based on a claim of ineffective assistance of counsel, the movant must satisfy, by a preponderance of the evidence, *Strickland v. Washington*'s two-pronged standard. 466 U.S. 668 (1984). It requires (1) deficient performance by trial counsel and (2) resulting prejudice. *See id.*; *United States v. Tapp*, 491 F.3d 263, 266 (5th Cir. 2007). Deficient performance requires performance that is "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 686. Prejudice from counsel's deficient performance requires a showing 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. Here, Blake shows neither deficient performance nor resulting prejudice. Distribution?

A. No Credible Evidence Reflects That Counsel's Performance Was Deficient.

Attorney Cavazos did not provide ineffective assistance by, as it is alleged, incorrectly advising Blake that he was likely to receive probation or a very light prison sentence if he were to plead guilty. Blake's testimony at the evidentiary hearing to that effect is unreliable and incredible, and the Court does not credit it or Blake's like-minded written statements. Cavazos's testimony, I presented the truth as asked to.
in contrast, was clear, consistent, forthright, and credible. The testimony at the hearing and in the Cavazos provides vauge testimony.
written statements of Blake's ex-wife Ms. Warren and his uncle Mr. Dyson does not materially assist Blake's motion to vacate. At best, those witnesses appeared confused or as though they were acting with incomplete information about the charges against Blake and the penalties he faced. Warren and Dyson were provided information from Cavazos, And anything
There is no dispute, however, that those witnesses were not present for any conversation between provided by Blake Also comes from Cavazos.
Cavazos and Blake, save for the initial single consultation Blake and Warren had with Cavazos

before any charges were filed. And while Warren's and Dyson's testimony does not strike the Court as necessarily incredible, it is not incompatible with Cavazos's testimony on any material issue and on significant occasion conflicts with Blake's testimony.

Meanwhile, Cavazos testified credibly at the hearing and by affidavit that he did not advise Blake that Blake was likely to receive probation or a very light sentence if he were to plead guilty. Rather, the evidence reflects, Cavazos had an initial consultation with Blake and Warren at which matters were discussed only in general terms, given that no formal charges had yet been brought. And Blake and Warren spoke initially to Cavazos in terms of *possession* of child pornography and nothing else. Cavazos never spoke to both Warren and Blake together again. *See generally* Tr. 10:5-6, 11:8-13, 54:10-23, 80:14-16, 81:9-11, 93:24-94:1, 111:4-8. Cavazos, it is undisputed, never spoke to both Blake and Dyson at the same time, and his conversations with Dyson were almost entirely about the testimony they feared Blake's daughter would offer at the sentencing hearing. *E.g.*, Tr. 127:18-24. But Cavazos, as related in detail in the Background section above, had numerous conversations with Blake about the case, the Government's evidence, and—most importantly for present purposes—the charges and possible sentence Blake faced. It is entirely implausible that Cavazos steadfastly advised Blake, as Blake contends, that Blake was likely to receive only a probation sentence or a very light sentence if he were to plead guilty, or that Cavazos failed to update an initial assessment made before any charges had been filed and when all that was on the table was a possible possession charge.

Undercutting the credibility of Blake's hearing testimony and written statements in support of the Motion to Vacate is, first, his signed, written plea agreement. The agreement cannot be squared with Blake's contention that he relied solely on advice from counsel indicating a probation or a very light sentence were likely if he were to plead guilty. The agreement, which Blake conceded he read in full before he signed it, Tr. 57:9-11, and which Cavazos credibly testified he

went over with Blake "page by page," Tr. 151:16-152:7, explained that Blake faced a five to 20-year sentence on Count 1 and a zero to 20-year sentence on Count 3. *See* Dkt. No. 41 (plea agreement). Attorney explained "it Could" Not would., And Could Change.

Further undercutting Blake's credibility is the plea colloquy. Firm declarations in open court, including a plea colloquy, carry a "strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). A movant such as Blake therefore must carry a heavy burden to show a guilty plea was involuntary despite his own sworn statements in open court. *DeVille v. Whitley*, 21 F.3d 654, 659 (5th Cir. 1994). And although the Court is charged here with assessing whether counsel was deficient and Blake suffered resulting prejudice, the plain thrust of Blake's ineffective-assistance claim is that his plea should be withdrawn. Blake cannot overcome the "strong presumption of verity" that attaches to his sworn statements in Court, let alone show that his plea should be withdrawn. As detailed above in the Background section, Blake stated under oath in open court that he went over the sentencing guidelines with his lawyer prior to the plea hearing, Attorny Never Provided a Calculation or Range.
Tr. 60:17-61:22, that he read and understood his plea agreement in full before signing it, Tr. 49:6-20, and that the Court advised him at the plea hearing of the sentencing range he faced, Tr.48:18-49:2. Testimony never Discussed Plea, / Guidelines Not Calculated or explained Properly.

The sworn testimony of Blake's counsel provides a third basis to discredit Blake's testimony and conclude instead that counsel was not ineffective as alleged. Cavazos's credible testimony directly conflicts with Blake's version of events at virtually every critical juncture. It is impossible to reconcile the two versions and comparing the credibility of Blake with his counsel reveals that Cavazos provided the only credible version of events. Attorney Can't Remember Calling FBI on 12/4/2014.

Indeed, internal inconsistencies in Blake's testimony or between Blake's testimony and that of his witnesses is yet a further reason to find him incredible. For example, and as detailed in the Background section above, Blake asserted repeatedly that he consistently believed throughout Attorney provides Vauge "Non-Commiting" testimony.

his case that Cavazos's alleged initial probation or time-served estimate remained valid. Yet Warren conceded that she and Blake discussed and were prepared for a 7-year, or even worst-case scenario 9-year, sentence. Blake's repeated insistence that he always believed he faced only a probation or very light sentence is therefore belied by his own witness.

Blake also maintained in his testimony that he never read the indictment, even as the record reflects, and Cavazos's testimony confirms, Blake was given a copy at his arraignment. Dkt. No. 7; Tr. 143:11-13. Then, Blake testified he never read the plea agreement and instead only "flipped through it," Tr. 30:4. But on cross examination he conceded that he had in fact read it in its entirety. Tr. 48:11-12, 57:9-11. Blake also maintained under oath at the hearing that Cavazos never went over the sentencing guidelines with him and how they might apply in his case. Tr. 39:11-21, 42:16-21, 64:19-21. But his ex-wife Warren's testimony indicated that Cavazos discussed the guidelines to some extent even at the initial consultation. 86:1-5, 11:18-19, 89:16-19. And on cross examination Blake acknowledged that he told the Court at his plea hearing that he had discussed the guidelines with Cavazos. Tr. 60:17-61:22. Finally, as reflected in the lengthy quotations from the hearing included in the Background section above, Blake's testimony at the February 25 hearing and in his statements was consistently overstated, evasive, less than candid, or a combination of these things. The Court finds him incredible.

In sum, the testimony and record in its entirety reveals, at most, that Cavazos provided Blake and his wife an initial assessment based on incomplete information and assuming future charges of only possession, which later Cavazos updated in discussions with Blake and which again was corrected by the written plea agreement and plea colloquy. Blake's witnesses do not assist his claim; they at most appeared uninformed or confused. There is ample reason to conclude that Blake withheld from them or failed to convey to them information as he learned it through the multiple discussions he had with Cavazos. There is no credible evidence in this record that counsel

provided ineffective assistance by incorrectly advising Blake that he was likely to receive probation or a very light prison sentence if he were to plead guilty. *See Tapp*, 491 F.3d at 266.

Attorney Never Provided Guideline Calculation, or Sentence exposure.

B. Blake Fails to Show Prejudice.

Blake hasn't shown that he suffered any prejudice as a result of Cavazos's alleged deficient performance. *See id.* Ultimately, Blake must show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017). Evaluating whether he has shown that reasonable probability requires the Court to "look to cotemporaneous evidence to substantiate [Blake's *post hoc*] expressed preference" for a trial over a guilty plea. *Young v. Spinner*, 873 F.3d 282, 286 (5th Cir. 2017).

Attorney Never investigated Distribution Evidence.

Here, the contemporaneous evidence reflects no reasonable person would have chosen a trial over a guilty plea. *Id.* at 286-88. Blake had acknowledged his guilt in statements made to investigating agents, which were the subject of a *failed* motion to suppress. *See* Dkt. No. 32 at 2; *see also* Dkt. No. 57. In his interview with agents, Blake admitted to receiving and downloading child pornography, identified various email accounts he used to send and receive child pornography, and acknowledged accessing a website where he could obtain child pornography as well as chat with others for email contacts for trading child pornography. Dkt. No. 57 at 6. Blake, in other words, had no reasonable opportunity to avoid a guilty verdict.

Agents Report is False

Not Correct. - Statements were not the Subject of Motion -

The Incorrect Facts were not Provided to Blake Prior to Plea.

Blake informed the Attorney the Facts were Not Correct.

At the same time, the record also reflects that *at that time* Blake wanted and needed to avoid a trial. At the February 25 hearing, Blake himself acknowledged this:

> A. Mr. Cavazos explained to me that it was the only plea I was going to get, and you do not want to go to trial. You have to take this.
> Q. And you didn't want to go to trial?
> A. No.
> Q. You knew the evidence against you? You knew what the FBI would find on your devices?

Blake was Never Provided any Evidence or Reports.

A. My decision to not go to trial was because my daughter made allegations of abuse, and I did not want that to go to a jury.

Tr. 58:11-19. * My attorneys only Advice * He Never explained Distribution.

The evidence reflects that Blake's decision to plead guilty was not only reasonable and plainly the most likely outcome, it was also informed and voluntary. Cavazos's affidavit explains that he advised Blake of the punishment range, and that he went over the plea agreement and presentence report "word by word" with Blake. Dkt. No. 96-1. Cavazos's affidavit further explains that he discussed with Blake on numerous occasions waiving the right to appeal as well as the conclusions of a forensic specialist who reviewed the evidence and was unable to corroborate Blake's theory that child pornography was put on his computer by some source other than Blake. *Id.* These matters are further confirmed by the discussions above, which detail the voluminous credible evidence establishing that Cavazos had conversations with Blake about the charges he faced and the sentencing consequences. Blake read the correct sentence range in the written plea agreement that he signed, and he was informed of it yet again in open court during the plea colloquy. Blake agreed to the factual basis in the plea agreement both in signing the agreement and in statements made in open court at the plea hearing. And at the plea hearing, the Court confirmed with Blake that paragraphs 2, 3, and 4 of the plea agreement reflected "what you did and . . . what you are pleading guilty to." Dkt. No. 72 at 7:8-15; *see* Dkt. No. 41. His plea, in other words, was knowing, informed and voluntary, and through it and his own statements he acknowledged his guilt to the charges on which he was ultimately sentenced. There is no showing of prejudice here.

Not informed properly - Distribution was Not Properly Presented -

The Affidavit is "Distorted" by the Court.

The Court makes a Gross Misunderstanding of Cavazo's Affidavit.

Attorney Cavazos Never Shared any evidence Reports with Blake. Not once.

The Court Makes Misunderstandings Based upon Speculations.

Not Properly Informed - Not at All.

WAS given an enhancement for Distribution by Peer-to-Peer.

? There is No peer-to-peer evidence on the Record. (See Sentencing)

Conclusion

For these reasons, it is recommended that Blake's Motion to Vacate, Dkt. No. 93, be **DENIED**.

Instructions for Service and Notice of Right to Object/Appeal

The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this report and recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The party shall file the objections with the Clerk of Court and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the un-objected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

IT IS SO ORDERED.

SIGNED this **13th day of October 2022.**

RICHARD B. FARRER
UNITED STATES MAGISTRATE JUDGE