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FILED
United States Court of Appeal
Tenth Circuit

January 5, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RYAN EDWARD OFFINEER,

Defendant - Appellant.

No. 23-7019
(D.C. Nos. 6:20-CV-00007-RAW &
6:18-CR-00050-RAW-1)
(E.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **BRISCOE**, and **EID**, Circuit Judges.

Ryan Edward Offineer, appearing pro se, seeks a certificate of appealability ("COA") to challenge the district court's denial of his motion collaterally challenging his sentence under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B) (an appeal may not be taken from a final order denying relief under § 2255 unless the movant obtains a COA). Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss this matter.

I.

Offineer pleaded guilty to Possession of Certain Material Involving Sexual Exploitation of Minors in violation of 18 U.S.C. § 2252(a)(4)(B). In the plea agreement,

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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Offineer admitted that, between June 2013 and March 7, 2018, he "purchased, downloaded[,] and possessed thousands of images and videos of minors engaging in sexually explicit conduct from a members-only internet website." R. Vol. III at 31 (sealed). He also agreed that his conduct satisfied the jurisdictional prerequisites for conviction. *Id.* (acts in E.D. Okla.; material had been transported in interstate commerce).

In his plea agreement, Offineer "waive[d] the right to directly appeal the conviction and sentence pursuant to 28 U.S.C. § 1291 and/or 18 U.S.C. § 3742(a)." R. Vol. III at 33 (sealed). Offineer also "waive[d] the right to collaterally attack the conviction and sentence pursuant to 28 U.S.C. § 2255, except for claims based on ineffective assistance of counsel." *Id.* (sealed).

The district court accepted Offineer's plea and sentenced him to 120 months of imprisonment followed by a 15-year term of supervised release. Offineer moved for relief from his sentence under 28 U.S.C. § 2255, requesting a revised sentence of 60 months of imprisonment followed by 20 years of supervised release. The district court declined Offineer's § 2255 motion and declined to issue a COA. Offineer filed a Notice of Appeal and now seeks a COA in this Court.

Offineer raises several issues in his brief. First, Offineer argues that the district court deprived him of his First Amendment right to "redress of grievances" by declining his § 2255 motion. Offineer also claims that he was denied his right of access to the courts because he did not have access to a law library during his time in the Muskogee County Jail. In addition, Offineer raises several arguments that we construe as ineffective

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assistance of counsel claims, including: that his counsel was ineffective for relying on *Riley v. California*, 573 U.S. 373 (2014), during the suppression hearing; that his counsel was ineffective for failing to investigate claims made by a law enforcement officer in the officer's affidavit in support of the government's response to the motion to suppress; that his counsel was ineffective for generally not arguing well enough, according to Offineer; that his counsel was ineffective for not objecting to the magistrate's report and recommendation regarding the suppression motion and failing to inform Offineer about his right to object to it; that his counsel was ineffective for not arguing properly under 18 U.S.C. § 3553(a)(6) about other sentences people received for the same crime; and that his counsel was ineffective because he "coached" Offineer to recite certain statements at the Change of Plea Hearing and "threat[ened] . . . [him with] a longer sentence if he did not." Aplt. Br. at 18. Finally, Offineer contends that the district court made two errors related to his counsel's ineffectiveness. Offineer complains that the district court's order "lacks the fairness, reasonableness, and [] leniency that should be given to pro se litigants" by not taking seriously his § 2255 motion's complaints about the plea deal his counsel negotiated for him, *see id.* at 13; and that the district court incorrectly deemed Offineer's counsel's failure to object to the Presentence Investigation Report ("PSR") not to be ineffective assistance of counsel, which Offineer claims amounted to rubber-stamping.

We first address whether each issue may be raised in this case and then address those issues that may.

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II.

a.

To obtain a COA, a criminal defendant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Whether to grant a COA is a "threshold question [that] should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 222, 336 (2003)). To meet this threshold, the applicant must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (cleaned up). "In evaluating whether an applicant has satisfied this burden, we undertake a preliminary, though not definitive, consideration of the legal framework applicable to each of the claims." *United States v. Parker*, 720 F.3d 781, 785 (10th Cir. 2013) (cleaned up). Offineer is a pro se movant, so we construe his briefing liberally but do not act as his advocate. *See United States v. Griffith*, 928 F.3d 855, 864 n.1 (10th Cir. 2019) (citing *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005)).

b.

We must first determine whether Offineer waived his right to appeal the issues he asserts. To determine whether a criminal defendant has waived his post-conviction or appellate rights in an enforceable plea agreement, we consider "(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant

knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice." *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc). We review "plea agreements and appeal waivers in light of the defendant's reasonable understanding at the time of the guilty plea[] and strictly construe[] the scope of an appellate waiver in favor of the defendant." *United States v. Novosel*, 481 F.3d 1288, 1291 n.1 (10th Cir. 2007) (citations omitted).[1]

The substantive claims Offineer raised in his § 2255 motion fall within the scope of his waiver of post-conviction rights. In his plea agreement, Offineer agreed to "waive[] the right to collaterally attack the conviction and sentence pursuant to 28 U.S.C. § 2255, except for claims based on ineffective assistance of counsel." R. Vol. III at 33 (sealed). Therefore, those of Offineer's original § 2255 claims that can reasonably be construed as ineffective assistance of counsel claims are not subject to the post-conviction waiver. However, the other claims Offineer raised in his § 2255 motion are plainly substantive claims, not allegations of ineffective assistance of counsel, and therefore these other claims fall within the scope of Offineer's post-conviction waiver. Neither Offineer's ~~First Amendment~~ claim about "redress of grievances" nor his claim about his denial of access to a law library relate to ineffective assistance of counsel.

[1] While the *Hahn* factors speak in terms of a waiver of appellate rights, we likewise apply them to waivers of the right to collaterally attack a conviction and sentence pursuant to § 2255. *See Parker*, 720 F.3d at 787 ("Applying the *Hahn* factors, the district judge concluded Parker's collateral attack waiver is enforceable . . . . We see no reason to quarrel with the judge's detailed analysis of the issue and see no basis upon which to debate the propriety of his decision.").

Accordingly, they clearly fall within the scope of the post-conviction waiver in Offineer's plea agreement.

Offineer also knowingly and voluntarily waived his right to appeal these issues. "When determining whether a waiver of appellate rights is knowing and voluntary, we especially look to two factors": first, "whether the language of the plea agreement states that the defendant entered the agreement knowingly and voluntarily"; and second, whether the district court administered "an adequate Federal Rule of Criminal Procedure 11 colloquy." *Hahn*, 359 F.3d at 1325 (citations omitted). Both factors indicate that Offineer's waiver was knowing and voluntary. During Offineer's change-of-plea hearing, the government noted that the parties had agreed to the standard waiver of appellate and post-conviction rights; and Offineer affirmed that he understood the terms of the plea agreement. The plea agreement does not use technical or complex language. It was straightforward, and Offineer initialed every page—including the page with the post-conviction waiver's terms. The district court also fulfilled its obligations under Rule 11. Offineer's waiver was thus knowing and voluntary.

Nor would enforcing Offineer's waiver result in a miscarriage of justice. "[E]nforcement of an appellate waiver does not result in a miscarriage of justice unless enforcement would result in one of [] four situations": (1) "the district court relied on an impermissible factor such as race"; (2) "ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid"; (3) "the sentence exceeds the statutory maximum"; or (4) "the waiver is otherwise unlawful." *Hahn*, 359 F.3d at 1327 (citations omitted). Offineer agreed to a standard waiver of post-conviction

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rights that is always used in the Eastern District of Oklahoma, and Offineer makes no argument that the negotiation of the waiver was itself a product of ineffective counsel. The post-conviction waiver was not based on any impermissible factor, the sentence was below the statutory maximum, and there is no indication of ineffective assistance of counsel in connection with the waiver itself. Moreover, the waiver is not "otherwise unlawful" under our precedent because Offineer identifies no error that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Hahn*, 359 F.3d at 1327 (quoting *United States v. Olano*, 507 U.S. 725 (1993)). Thus, a miscarriage of justice will not result from the enforcement of Offineer's waiver. The district court correctly dismissed as waived Offineer's substantive claims challenging the alleged denial of his rights to "redress of grievances" and to access a law library.

c.

We construe several of Offineer's claims to be ineffective assistance of counsel claims, and therefore outside the scope of his waiver. Nevertheless, none of his claims warrants a COA because no reasonable jurist could debate whether Offineer's counsel met the minimum level of competence required by our precedents. "The two-prong test established in *Strickland v. Washington* . . . determines whether a defendant's counsel was ineffective. To prevail on an ineffectiveness claim, a defendant must show both that his counsel's performance was substandard and that he was prejudiced by that substandard performance." *Osborn v. Shillinger*, 997 F.2d 1324, 1328 (10th Cir. 1993) (citing, *inter alia*, *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). A criminal defendant can satisfy the test's first prong by showing that counsel performed below the

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level expected from a reasonably competent attorney in criminal cases. *See Strickland*, 466 U.S. at 688–89. However, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* at 689. "[R]egardless of counsel['s] performance, failure to show prejudice defeats [an] ineffectiveness claim." *Osborn*, 997 F.2d at 1328 (citing *Strickland*, 466 U.S. at 697). To meet the test's second prong, Offineer "must show 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.

1.

Offineer's claims about ineffective assistance related to the suppression hearing fail. Even though the court found *Riley* distinguishable, it was objectively reasonable for Offineer's counsel to rely upon a relatively recent Supreme Court case involving similar issues. Accordingly, Offineer cannot satisfy *Strickland* on that ground.

Nor can we fault Offineer's counsel's alleged failure to investigate claims made in a Special Agent's affidavit. "We assess a decision not to investigate for 'reasonableness' under the circumstances, 'applying a heavy measure of deference to counsel's judgments.'" *Newmiller v. Raemisch*, 877 F.3d 1178, 1198 (10th Cir. 2017) (quoting *Strickland*, 466 U.S. at 691). Ultimately, "'what investigation decisions are reasonable depends critically' on 'information supplied by the defendant.'" *Id.* (quoting *Strickland*, 466 U.S. at 691). Offineer identifies no information that he provided his counsel to prompt further investigation of the Special Agent's affidavit, so we therefore defer to

Offineer's counsel's judgment and conclude that counsel's decision regarding further investigation was reasonable.

Lastly, Offineer argues broadly against counsel's effectiveness at the suppression hearing. We do not credit ineffective-assistance claims that are "impermissibly vague," because, among other reasons, "conclusory allegations . . . do not satisfy *Strickland*'s prejudice inquiry." *United States v. Pena*, 566 F. App'x 645, 650 (10th Cir. 2014) (unpublished) (citing *Cummings v. Sirmons*, 506 F.3d 1211, 1234 (10th Cir. 2007)).

2.

Offineer next challenges as ineffective assistance his counsel's failure to object to the magistrate's report and recommendation on the suppression of evidence. Offineer's arguments fail under *Strickland* because his counsel's failure to object to the report and recommendation was objectively reasonable. The report and recommendation held that "[t]he warrant in this case authorized the search for and seizure of evidence capable of being stored on a laptop computer . . . so the executing officers needed no further authorization to search the Defendant's computer." R. Vol. I at 88. Counsel reasonably believed that any objection would have been futile under our current precedents. We agree that any objection on these facts would have been meritless. *See United States v. Burgess*, 576 F.3d 1078, 1092 (10th Cir. 2009). And as we have held in the past, "[r]easonable jurists could not debate" that "counsel was not ineffective for failing to make meritless objections." *Pacheco v. Habti*, 62 F.4th 1233, 1247 (10th Cir.), *cert. denied*, 143 S. Ct. 2672 (2023). Therefore, Offineer cannot demonstrate ineffective assistance of counsel on this issue.

3.

Offineer also makes three ineffective assistance claims related to his sentencing. First, he argues that his counsel was ineffective for not arguing properly under 18 U.S.C. § 3553(a)(6) that he should have received a lesser sentence because of other sentences people received for the same crime. Offineer also argues that his counsel was ineffective because he "coached" Offineer to recite certain statements at the Change of Plea Hearing and "threat[ened] . . . [him with] a longer sentence if he did not," *see* Aplt. Br. at 18. Finally, Offineer complains that his counsel failed to object to the PSR, and that the district court allegedly rubber-stamped that failure.

Offineer cannot satisfy either prong of *Strickland* for these claims. Because Offineer agreed to a certain sentence in his plea agreement, it was objectively reasonable for his counsel not to mount a collateral attack on the sentence during Offineer's change-of-plea hearing. It was objectively reasonable for Offineer's counsel to explain to him what was required at his hearing, and to explain the likely results if he did not comply. And it was objectively reasonable not to object to a PSR, when any objection would have been futile. Nor can Offineer show any prejudice: he bargained for a sentence; and he got what he bargained for. Accordingly, these ineffective assistance claims fail.

4.

Offineer also makes an ineffective assistance claim directed toward actions of the district court. In particular, he claims that the district court's order "lacks the fairness, reasonableness, and [] leniency that should be given to pro se litigants" by not taking seriously enough his § 2255 motion's complaints about the plea deal his counsel

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negotiated for him instead of going to trial. *See* Aplt. Br. at 13. We liberally construe this as an ineffective assistance of counsel claim about the actual deal that Offineer's counsel negotiated for him. Offineer got half the maximum potential sentence for this crime and agreed to the deal in a signed writing. He was free to reject the plea deal. But he accepted it. Negotiating a plea deal for half the maximum sentence is well within objectively reasonable performance of counsel.

* * *

Based on the claims that can reasonably be construed as ineffective assistance of counsel claims, Offineer has not shown that he had ineffective assistance of counsel.[2] Most choices by counsel are entitled to a "virtually unchallengeable presumption of reasonableness" under our precedents. *Newmiller*, 877 F.3d at 1197. Offineer's counsel's strategic choices are entitled to that presumption here; and in any event, Offineer cannot show prejudice. The issues presented by Offineer were not "adequate to deserve encouragement to proceed further," and reasonable jurists could not debate otherwise. *Slack*, 529 U.S. at 484. Therefore, like the district court, we deny a COA. *See id.*

[2] To the extent that Offineer has any remaining claims for ineffective assistance of counsel, they are subsumed within the broad claims discussed above and similarly fail. Offineer's defense counsel performed as a reasonable attorney would throughout this case. The evidence against Offineer and case law were clear, and he admitted to the relevant facts in accepting the plea agreement. The sentence he received was reasonable, and he agreed to it in writing. Offineer's ineffective assistance of counsel claims fail, and his other claims were waived by the plea agreement.

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III.

We DENY a COA and DISMISS this matter.

Entered for the Court

Allison H. Eid
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	**FILED UNDER SEAL**
Plaintiff/Respondent,	)	
	)	**Criminal Case No. CR-18-00050-RAW**
v.	)	
	)	**Civil Case No. CV-20-00007-RAW**
RYAN EDWARD OFFINEER,	)	
	)	
Defendant/Petitioner.	)	Doc #122

ORDER

Now before the court is the *pro se* motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence ("§ 2255 motion") filed by Defendant Ryan Edward Offineer ("Defendant"). [CR Doc. 68; CV Doc. 1]. The Government filed a sealed brief in opposition to Defendant's § 2255 motion. [CR Doc. 103]. Defendant filed a reply. [CR Doc. 109]. Defendant later filed a motion for leave to amend his § 2255 motion, which the court granted. [CR Docs. 118 and 119]. Also before the court are Defendant's motion to compel [CR Doc. 101], motion for discovery and motion for production of documents [CR Doc. 102], second motion for production of documents [CR Doc. 106] and brief in support [CR Doc. 107], second motion to compel [CR Doc. 117], and motion for appointment of counsel [CR Doc. 121].[1]

On April 12, 2018, a Criminal Complaint was filed in this court charging Defendant with Sexual Exploitation of Children, Distribution and/or Receipt of Visual Depiction of a Minor Engaged in Sexually Explicit Conduct, and Possession of and Access with Intent to View a Visual Depiction of a Minor Engaged in Sexually Explicit Conduct. In conjunction with the filing of the Complaint, a warrant for Defendant's arrest was issued. On April 13, 2018, Defendant was arrested on the warrant. On April 16, 2018, Defendant appeared before United

[1] Defendant's motion for sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) (filed approximately four months after his § 2255 motion was filed) was denied in a separate sealed order. [CR Docs. 84 and 110]. Defendant appealed (Tenth Circuit Case No. 20-7062), but later filed a motion to withdraw appeal with the Circuit. The motion, construed as a motion to voluntarily dismiss the appeal, was granted and the appeal was dismissed. [CR Doc. 114]. Defendant also filed a Petition for Writ of Mandamus with the Circuit (Tenth Circuit Case No. 22-7037), and it was dismissed for lack of prosecution. [CR Doc. 120].

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States Magistrate Judge Kimberly E. West for an initial appearance. [CR Doc. 11]. Robert S. Williams, Assistant Federal Public Defender, was appointed as counsel for Defendant. *Id.* Defendant acknowledged receipt of a copy of the Complaint. *Id.* Defendant was advised of the charges and possible penalties. *Id.* Defendant requested a preliminary hearing. *Id.* Following testimony at a preliminary/detention hearing on April 17, 2018, the court found probable cause and ordered Defendant detained. [CR Docs. 17 and 34].

On June 11, 2018, a federal grand jury charged Defendant by Indictment with Count One: Sexual Exploitation of Children, in violation of 18 U.S.C. § 2251(a); Count Two: Possession of Certain Material Involving the Sexual Exploitation of Minors, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2); and Forfeiture Allegation, in violation of 18 U.S.C. § 2253 and 28 U.S.C. § 2461(c). On June 20, 2018, Defendant appeared in person, with counsel, for his arraignment on the Indictment. [CR Doc. 26]. Defendant acknowledged receipt of the Indictment and agreed that he had an opportunity to discuss it with counsel. *Id.* Defendant was advised of the charges and possible penalties. *Id.* Defendant entered a not guilty plea to both charges. *Id.*

Defense counsel filed a motion to suppress evidence on July 12, 2018. [CR Doc. 33]. Defendant sought the suppression of "all evidence and statements related to the search of [Defendant]'s vehicle, the computer located therein, and statements allegedly made during the custodial interrogation of [Defendant]." *Id.* at 1. The suppression hearing was held on July 25, 2018. [CR Doc. 41]. United States Magistrate Judge Steven P. Shreder entered his Report and Recommendation ("R & R") granting in part and denying in part Defendant's motion to suppress on August 3, 2018. [CR Doc. 42].

On August 23, 2018, Defendant pleaded guilty pursuant to a Rule 11(c)(1)(C) to Count Two of the Indictment. [CR Docs. 48 and 50]. In exchange for Defendant's guilty plea to Count Two, the Government agreed to dismiss Count One at the time of sentencing. [CR Doc. 50 at 2]. The plea agreement called for a sentence of 120 months in the Bureau of Prisons, to be followed by a 15-year term of supervised release. *Id.* at 8. The agreement contained the following factual basis for Defendant's plea:

> Beginning in June 2013, to March 7, 2018, the defendant purchased, downloaded and possessed thousands of images and videos of minors engaging in sexually explicit conduct from a members-only internet website. The defendant accessed the site after showing an interest in child exploitation material and being accepted

> for membership. Once invited to join, the defendant was required to set up an account which included a username, password and email address. After the defendant paid a fee, he received a password to unlock the purchased files containing child exploitation material and was given a URL (uniform resource locater) to the site. The defendant purchased, downloaded and possessed the images and videos of minors engaging in sexually explicit conduct within the Eastern District of Oklahoma which had been transported in interstate commerce by means of a computer.

Id. at 2. The agreement included a waiver of appellate and post-conviction rights. Defendant waived the right "to directly appeal the conviction and sentence pursuant to 28 U.S.C. § 1291 and/or 18 U.S.C. § 3742(a)." *Id.* at 4. Defendant also waived the right "to collaterally attack the conviction and sentence pursuant to 28 U.S.C. § 2255, except for claims based on ineffective assistance of counsel." *Id.*

A Presentence Investigation Report ("PSR") was prepared prior to sentencing. On December 12, 2018, the court accepted the plea agreement and Defendant was sentenced to a term of imprisonment of 120 months, to be followed by a 15-year term of supervised release. [CR Doc. 60]. In addition, Defendant was ordered to pay restitution in the amount of $8,500.00 and a special assessment of $100.00. *Id.* He was advised of his right to appeal at the time of sentencing. *Id.* at 2. Judgment was entered on December 13, 2018. [CR Doc. 62]. Defendant did not file a direct appeal.

Defendant now raises various ineffective assistance of counsel claims in his § 2255 motion. The claims may be summarized as follows:

In Ground One, Defendant claims counsel failed to provide reasonable and professional adversarial challenge throughout his indictment process, that counsel failed to object to the admission of evidence during the hearing on July 25, 2018, that counsel failed to inform Defendant of his right to appeal the court's decision regarding the hearing on July 25, 2018, that counsel failed to inform Defendant of his right to analyze the evidence against him, that counsel failed to inform Defendant of his right to request a bench trial, and that counsel used coercion and duress to influence Defendant's decision to sign the plea agreement "through the threat of a longer sentence if the initial plea agreement was not accepted." [CR Doc. 68 at 5].

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In Ground Two, Defendant claims counsel failed to conduct a reasonably adequate investigation before advising Defendant to plead guilty. *Id.* at 10. Defendant argues that counsel failed to analyze the quantity of images and videos for accuracy, that counsel failed to analyze the validity of images and videos for accuracy, that counsel failed to investigate, analyze, and present Defendant's "life-history records" to the court, and that counsel failed to present a sentencing memorandum on Defendant's behalf. *Id.*

In Ground Three, Defendant claims counsel failed to present facts and evidence on Defendant's behalf in violation of 18 U.S.C. §§ 3553, 3582 and 3661. *Id.* at 14.

In Ground Four, Defendant claims counsel failed to challenge and to correct errors and omissions in the PSR. *Id.* at 20. He first argues that counsel "failed to reasonably investigate, analyze, and correct errors listing two victims" after his acceptance of the plea agreement. *Id.* Defendant also complains that counsel "failed to reasonably investigate, prepare, and present the omission of the Defendant's mental health and mental health history," and failed to seek a mental health evaluation "despite having ample evidence of potentially mitigating mental health issues." *Id.* at 20, 21.

Defendant also requests "a lateral departure from his sentence based on his lack of significant prior criminal history, his genuine remorse of his crime, and his awareness of the harmful effects of his crime." *Id.* at 26. Defendant first asks the court to reduce his sentence to sixty (60) months of imprisonment, followed by 240 months of supervised release. *Id.* This sentence, according to the Defendant, "will provide for sufficient, but not greater than necessary punishment while providing an adequate deterence [sic] to criminal conduct, protecting the public from further crimes of the defendant, and providing the defendant the needed treatment in the most effective manner." *Id.* Most recently, in his motion for leave to amend his § 2255 motion, Defendant requests a 60-month sentence, followed by 60 months of supervised release. [CR Doc. 118 at 1, 5].

In response, the Government first contends that Defendant waived his right to file a § 2255 motion.[2] [CR Doc. 103 at 12-15]. The Government also contends that Defendant cannot

[2] The Government concedes that Defendant's § 2255 motion is timely. [CR Doc. 103 at 12].

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establish ineffective assistance of counsel. *Id.* at 15-24. Lastly, the Government claims the court may properly overrule Defendant's motion without an evidentiary hearing. *Id.* at 24-25.

An affidavit provided by Mr. Williams, Assistant Federal Public Defender and counsel for Defendant, is attached to the Government's response. [CR Doc 103-1]. Counsel's experience with federal criminal cases dates back to 2007, when he started serving as a CJA panel attorney. *Id.* at 1. He joined the Federal Public Defender's Office in 2016. *Id.* Counsel provides the following statement under oath in response to Defendant's allegations:

> I have been informed by the United States Attorney's Office of the allegations made by my former client, Ryan Edward Offineer, in his application for sentencing relief, pursuant to 28 U.S.C. § 2255, filed in the Eastern District of Oklahoma case number 18-CR-50-RAW. The purpose of this affidavit is to inform the Court as to those allegations.
>
> I was appointed to represent [Defendant] on April 16, 2018, in Eastern District of Oklahoma case number 18-CR-50-RAW, wherein [Defendant] was charged with: Count One, Sexual Exploitation of Children, in violation of 18 U.S.C. § 2251(a); Count Two, Possession of Certain Material Involving Exploitation of Minors, in violation of 18 U.S.C. §§ 2252(a)(4)(B) & 2252(b)(2); and Forfeiture Allegation, in violation of 18 U.S.C. § 2253 and 28 U.S.C. § 2461(c).
>
> At arraignment, I discussed the charges in the Indictment and the possible penalties with [Defendant].
>
> Prior to entering into the plea agreement with the Government, I met with [Defendant] and informed him of the charges contained in the Indictment, the possible penalties, the estimated Guideline range, and the consequences of pleading guilty. I reviewed the plea agreement with [Defendant] and counseled him that the choice to accept the plea agreement was his, as was the choice to plead guilty or continue with his not guilty plea. I advised Defendant of the consequences of entering into the plea agreement, specifically, the waiver of his right to trial. I answered any and all questions [Defendant] had regarding the plea agreement. [Defendant] voluntarily and knowingly chose to the enter the plea agreement.
>
> Prior to the change of plea hearing, I again informed [Defendant] of the charges in the Indictment, the possible penalties, the estimated Guideline range, and the consequences of pleading guilty. I counseled [Defendant] that the decision to plead guilty was solely his. [Defendant] persisted in his decision to plead guilty.
>
> After review of the case, I chose to seek the suppression of evidence related to the search of [Defendant]'s vehicle, which included the computer, and statements [Defendant] made during a custodial interrogation. I appeared before the Court

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and argued in support of the motion. Ultimately, the district court denied the motion. Based on my experience, I made the educated decision not to appeal the decision based on the evidence in the case and current legal authority. Additionally, [Defendant] accepted a plea agreement, which precluded appeal of the suppression issue.

[Defendant] alleges I did not advise him of his right to analyze the evidence in this case. I provided [Defendant] full access to the discovery in this case. I reviewed the discovery with [Defendant], and I discussed with [Defendant] that the evidence against him strongly supported, rather than refuted the charges contained in the Indictment.

[Defendant] contends I was ineffective for failing to file a sentencing memorandum on his behalf. At no time prior to sentencing did [Defendant] request that I file a sentencing memorandum. Nor, in my experience, did I deem it necessary to do so, in light of the plea agreement in the case.

[Defendant] argues that I failed to search for and present significant mitigating circumstances. It is unclear what mitigating circumstances [Defendant] is referring to, nor was I aware of any at the time of my representation. Defendant did not state or bring to my attention any facts I considered mitigating circumstances. Any such mitigating evidence would not have been relevant given the nature of the plea agreement.

[Defendant] alleges I failed to correct errors and omissions in the PSR. Specifically, the listing of 2 victims after he accepted his plea agreement. Upon receipt of the draft PSR and upon receipt of the final PSR, I reviewed both with [Defendant]. At no time did he identify or question the listing of 2 victims. Nor did I identify it as an issue to bring to the Probation Office's attention for correction.

[Defendant] contends I failed to correct the omission of his mental health history from the PSR. Again, upon receipt of the draft and final PSR, I reviewed both with Defendant. Both the draft and final PSR contained information regarding Defendant's lack of mental health history. At no time during my representation did I discern mental health issues suffered by [Defendant] that would affect his ability to understand the proceedings or the consequences of pleading guilty. Nor did I identify any mental health issues that would justify a mitigating circumstance for sentencing purposes.

Based upon the foregoing, your Affiant denies the allegations contained in [Defendant]'s 28 U.S.C. § 2255 motion.

Id. at 1-3.

In the case at hand, the Government argues that Defendant's motion falls within the scope of the post-conviction waiver, and that the motion is without merit and should be

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dismissed. But, the Government addresses "the merit of Defendant's claims as a precaution in the event this Court determines the waiver is not controlling." [CR Doc. 103 at 15]. Upon close inspection, it is apparent that Defendant is asserting claims based on ineffective assistance of counsel. Defendant's ineffective-assistance claims are not waived and can be reviewed on the merits.

The Sixth Amendment gives criminal defendants the right to effective assistance of counsel, and claims of ineffective assistance of counsel are governed by the familiar two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under the *Strickland v. Washington* standard, Defendant must demonstrate that (1) the representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance prejudiced the defense. *Id.*, 466 U.S. at 687. Regarding the first prong, the *Strickland* Court provided the following guidance:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id. at 689 (internal citation omitted). With respect to the second prong, the Supreme Court explained a 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. This court "may address the performance and prejudice components in any order, but need not address both if [Defendant] fails to make a sufficient showing of one." *Foster v. Ward*, 182 F.3d 1177, 1184 (10th Cir. 1999). "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 599 U.S. 356, 371, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). "*Strickland* does not guarantee perfect representation, only a reasonably competent attorney." *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (citations and internal quotation marks omitted).

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Defendant first argues in Ground I that counsel failed to provide reasonable and professional adversarial challenge throughout his indictment process. Defendant's claim is vague. He fails to establish how counsel's performance was deficient, or that Defendant was prejudiced. Defendant fails to show counsel was ineffective.

Defendant's next two arguments in Ground I relate to his suppression hearing. As noted above, Defendant sought the suppression of "all evidence and statements related to the search of [Defendant]'s vehicle, the computer located therein, and statements allegedly made during the custodial interrogation of [Defendant]." [CR Doc. 33 at 1]. Counsel for both parties made compelling arguments during the hearing, and Judge Shreder took the matter under advisement.[3] Ultimately, Judge Shreder recommended that Defendant's motion to suppress be granted in part and denied in part. [CR Doc. 42]. Judge Shreder found "that any statements made by the Defendant in response to questioning after his arrest and assertion of his right under *Miranda*, should be suppressed, but any evidence seized from the search of his vehicle or the subsequent [search] of his laptop computer found in the vehicle should not be suppressed." *Id.* at 8. The R & R was entered on August 3, 2018, and the parties were informed that any objections to the R & R "must be filed within fourteen (14) days." *Id.* No objections to the R & R were filed. Defendant's notice of intent to enter plea was filed on August 20, 2018. [CR Doc. 44].

Defendant vaguely complains that counsel "failed to object to the admission of evidence against the [Defendant] during an evidence hearing on July 25, 2018." [CR Doc. 68 at 5]. Defendant, however, does not identify the evidence to which his attorney should have objected, why he should have objected to it, or how Defendant was prejudiced by it. This claim fails under both prongs of *Strickland*.

Defendant next claims that counsel "failed to inform the [Defendant] of his right to appeal the Court's decision regarding the evidence hearing on July 25, 2018." *Id.* Defendant's claim is implausible. Still, Defendant fails to show that he was prejudiced by the alleged deficient representation. The R & R was well-reasoned, and counsel explains that he did not appeal the decision "based on the evidence in the case and current legal authority." [CR Doc. 103-1 at 2]. Counsel informed Defendant of the consequences of pleading guilty, and Defendant

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[3] The suppression hearing has not been transcribed, but the recording has been reviewed.

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voluntarily and knowingly chose to enter the plea agreement. *Id.* at 1-2. Defendant's *Strickland* claim fails under the second prong.

Defendant also alleges that counsel failed to inform Defendant of his right to analyze the evidence against him. The Government reminds the court that the "evidence was contained within Defendant's own computer." [CR Doc. 103 at 19]. Additionally, Defendant's claim is in direct contrast to defense counsel's affidavit. Counsel states: "I provided [Defendant] full access to the discovery in this case. I reviewed the discovery with [Defendant], and I discussed with [Defendant] that the evidence against him strongly supported, rather than refuted the charges contained in the Indictment." [CR Doc. 103-1 at 2]. Defendant fails to show counsel was ineffective.

In the last subparts of Ground I, Defendant claims that counsel failed to inform Defendant of his right to request a bench trial, and that his attorney used coercion and duress to influence his decision to sign the plea agreement. [CR Doc. 68 at 7]. In response, the Government contends that "[t]hese claims are unsubstantiated by the record, are contradictory to counsel's recollection of the proceedings, and fail to meet the standard of ineffective assistance of counsel as set forth in *Strickland*." [CR Doc. 103 at 19]. The court agrees with the Government.

Defendant's claim that counsel failed to inform Defendant of his right to request a bench trial is inconsistent with his sworn testimony before Judge West during the change of plea hearing.[4] Defendant was specifically asked if he understood that if he pleaded guilty, he would be giving up his right to a trial and there would be no further trial of any kind either before a court or a jury. Defendant answered "yes, ma'am." Defendant has not shown that counsel was ineffective.

Nor is the court persuaded that counsel used coercion and duress to influence Defendant's decision to sign the plea agreement. Defendant contends that the "undue influence

[4] "Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). The change of plea hearing has not been transcribed, but the recording has been reviewed.

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was the result of a conversation in which [counsel] told [Defendant] that nearly all sex case defendants are found guilty and [Defendant] should sign the agreement to avoid being found guilty of the first count of the indictment." [CR Doc. 68 at 7]. Looking first to the plea agreement, the court notes that Defendant initialed every page, and Defendant and defense counsel signed page 11. On that page, above Defendant's signature, is the following language:

> ACKNOWLEDGMENTS
>
> I have read this agreement and carefully reviewed every part of it with my attorney. I fully understand it and I voluntarily agree to it without reservation. No promises, agreements, understandings, or conditions have been made or entered into in connection with my decision to plead guilty except those set forth in this plea agreement. I am satisfied with the legal services provided by my attorney in connection with this plea agreement and matters related to it. I do this of my own free will. No threats have been made to me, nor am I under the influence of anything that could impede my ability to fully understand this plea agreement.

[CR Doc. 50 at 11].

Defendant's claim that his attorney used coercion and duress to influence his decision to sign the plea agreement is also undermined by his sworn testimony at the change of plea hearing. Judge West confirmed that Defendant was clearheaded and unimpaired at the time of the hearing. Defendant testified that he was taking blood pressure medication, as well as Effexor. He specifically denied ever being confined in a hospital for mental care or mental observation, and he denied being treated by a doctor for mental illness. Defense counsel denied having any reason to believe Defendant was not mentally competent to understand and appreciate the charges against him. Based upon the responses of Defendant, his counsel and the observations of the court, Judge West found Defendant was mentally competent to understand and appreciate the charges against him and the nature and consequences of the proceeding. Defendant affirmed that he wished to waive or give up his right to a jury trial and enter a plea before the court. Counsel for the Government explained that Defendant was pleading guilty to Count Two of the Indictment, and further stated the nature of the charge against Defendant and the range of punishment. Defendant affirmed that he heard the announcement of the charge against him and the possible range of punishment on the charge. Defendant affirmed that he was ready to enter a plea at that time, and he pleaded guilty to Count Two of the Indictment.

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Defendant affirmed that he had told his attorney all of the facts and circumstances known to him about the charge, and that he believed his attorney was fully informed on all such matters. Defendant was asked if he understood that he had a right to a jury trial and that only he could waive or give up that right. He answered in the affirmative. He was specifically asked if he understood that if he pleaded guilty, he would be giving up his right to a trial and there would be no further trial of any kind either before a court or a jury. He answered in the affirmative. Of significant importance, Defendant was asked if his plea of guilty was made voluntarily and completely of his own free choice. Defendant stated, "yes, ma'am." Defendant was asked if he had been forced or threatened in any way or promised anything by any person to plead guilty. Defendant stated, "no, ma'am."

Counsel for the Government stated the essential terms of the plea agreement, noting in part that the parties agreed to the standard waiver of appellate and post-conviction rights. Defendant affirmed that he heard the announcement of the terms of the plea agreement, and he affirmed that it was his understanding as well. Defendant was asked if he was satisfied with the services of his attorney, and if he believed that Mr. Williams had done all that anyone could do as counsel to assist him in this case. Defendant answered both questions in the affirmative. When asked if he wanted to waive his right to a jury trial, Defendant affirmed. Defendant testified that he signed the waiver of jury form, and Judge West stated that it shall be filed of record in this case. She then said, "Sir, I'm going to ask you again, understanding the nature of the charge against you and the effect and consequences of your plea, how do you plead, guilty or not guilty, to Count Two contained in the Indictment?" Defendant responded, "guilty." Defendant stated the facts relating to the charge. At the end of the change of plea hearing, Judge West found that Defendant was mentally competent to appreciate and understand the acts he committed on or about the dates alleged in the Indictment, and to realize the nature, purpose, and consequences of those acts at the time they were committed. Judge West was satisfied that the Defendant was fully aware of what he was doing, and that he was knowingly, intelligently, and willfully waiving his right to a trial and pleading guilty. Based on his admissions, his demeanor, and his clear and responsive answers to her questions, Judge West found that there was a factual basis for Defendant's plea of guilty, and that his plea of guilty was made voluntarily, with his understanding of the charge against him, and with the knowledge of the consequences of his

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plea. The court accepted Defendant's plea of guilty and found that he was guilty of Count Two of the Indictment.

Prior to sentencing, a PSR was prepared. Consistent with his testimony at the change of plea hearing, the PSR noted that Defendant "was prescribed Effexor (Venlafaxine) by physicians at the Muskogee County Jail as a mood stabilizer and anti-depressant." *PSR* at ¶ 53. It further noted that, "[p]rior to his detention, the defendant had never been diagnosed with any mental health disorder, nor had he ever been prescribed any mental health medications." *Id.* Defendant felt that he "may need to be evaluated for mental health disorders while in the custody of the Bureau of Prisons." *Id.* Defendant admitted to smoking marijuana and consuming alcohol at various points in his life. *PSR* at ¶ 54. "He estimated his last marijuana use was approximately 8 years ago," and he "did not report any history of substance abuse treatment." *Id.* He also graduated from high school (in the upper half of his class) and earned 68 hours of college credit. *Id.* at ¶ 55. Of significant importance, the PSR noted that "[h]ad the defendant been convicted of Count 1, or both Counts 1 and 2 of the Indictment, his guideline range of imprisonment would have been 180-210 months with a statutory minimum sentence of at least 180 months imprisonment." *PSR* at ¶ 62. The impact of the plea agreement, therefore, was "a minimum of 60 months and a maximum of 90 months imprisonment to the benefit of the defendant." *Id.*

Neither party objected to the PSR at the sentencing hearing. [CR Doc. 60 at 1]. The Government summarized the plea agreement in open court.[5] After receiving affirming answers from Defendant, the undersigned also established Defendant's plea of guilty was consensual and affirmed the finding of guilt. Towards the end of the hearing, the court asked Defendant if there was anything he would like to say, and Defendant stated "no, sir." At no point during the sentencing hearing, like the change of plea hearing before, did Defendant raise any points of dissatisfaction with counsel.

To establish prejudice on this claim, Defendant is required to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Here, the court is not convinced "that a decision to reject the plea bargain would have

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5 The sentencing hearing has not been transcribed, but the recording has been reviewed.

been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). Defendant was facing a lengthy prison sentence if convicted under Count One, or Counts One and Two, of the Indictment. A rational defendant would not have rejected a plea deal under the circumstances. Accordingly, Defendant's ineffective-assistance claim is denied.

Defendant contends in Ground II that counsel failed to conduct a reasonably adequate investigation before advising Defendant to plead guilty. [CR Doc. 68 at 10]. He argues that counsel failed to analyze the quantity of images and videos for accuracy, and that counsel failed to analyze the validity of images and videos for accuracy. *Id.* As noted above, Defense counsel's affidavit states: "I provided [Defendant] full access to the discovery in this case. I reviewed the discovery with [Defendant], and I discussed with [Defendant] that the evidence against him strongly supported, rather than refuted the charges contained in the Indictment." [CR Doc. 103-1 at 2].

Defendant's claims are conclusory and not supported by the record. Further, Defendant has not demonstrated he was prejudiced by counsel's alleged failures. As noted by the Government, Defendant fails to establish how the alleged failures "would have affected his decision to enter into the plea agreement with the Government." [CR Doc. 103 at 21]. These claims do not entitle Defendant to relief.

Defendant next complains in Ground II that counsel was ineffective for failing to "investigate [his] life-history records for potentially significant mitigating circumstances." [CR Doc. 68 at 11]. Defendant's claim is vague. Even assuming counsel did not investigate Defendant's life history records, Defendant does not identify any mitigating circumstances that are "potentially significant." Defendant fails to show he was prejudiced by the alleged deficient performance, and this claim fails.

In the remaining subpart of Ground II, Defendant contends that counsel was ineffective for failing to file a sentencing memorandum on Defendant's behalf. *Id.* The argument falls flat. The parties agreed to a 120-month sentence. The court accepted the plea agreement and Defendant was sentenced to a term of imprisonment of 120 months. A sentencing memorandum would have provided no benefit to Defendant. *See Hughes v. United States*, --- U.S. ---, 138 S.Ct. 1765, 1778, 201 L.Ed.2d 72 (2018) (explaining that "once the district court accepts the

agreement [under Rule 11(c)(1)(C)], the agreed-upon sentence is the only sentence the court may impose."). Defendant cannot show that counsel's performance was deficient for failing to file a sentencing memorandum, or that he was prejudiced by the alleged deficient performance.

Defendant claims in Ground III that counsel failed to present facts and evidence on Defendant's behalf in violation of 18 U.S.C. §§ 3553, 3582 and 3661. [CR Doc. 68 at 14]. Defendant refers to "significant mitigating" factors, including his "lack of significant criminal history, [his] excellent employment record, [his] presence in the community as a small business owner, [his] lack of recent substance abuse, and [his] genuine remorse of [his] crime. *Id.* at 15. The PSR, however, included the offense conduct, the adjustment for acceptance of responsibility, the offense level computation, Defendant's criminal history, and Defendant's characteristics (e.g., his physical condition, mental and emotional health, history of substance abuse, and employment record). The PSR also specifically addressed the "impact of plea agreement." *PSR* at ¶ 62.

Defense counsel claims he was unaware of any mitigating circumstances at the time of his representation, but that "[a]ny such mitigating evidence would not have been relevant given the nature of the plea agreement." [CR Doc. 103-1 at 2]. The court agrees. After reviewing the Sentencing Guidelines and the PSR, the court accepted the plea agreement, and the court imposed the agreed-upon sentence. [CR Docs. 60 and 63]. Under the circumstances, the agreed-upon sentence was the only sentence the court could impose. Because Defendant fails to demonstrate he was prejudiced, this claim fails.

Defendant argues in Ground IV that counsel failed to challenge and correct errors and omissions in the PSR. [CR Doc. 68 at 20]. He first claims counsel "failed to reasonably investigate, analyze, and correct errors listing two victims" after his acceptance of the plea agreement. *Id.* Defense counsel's affidavit, however, states that he reviewed the draft and final PSR with Defendant, and "[a]t no time did [Defendant] identify or question the listing of 2 victims." [CR Doc. 103-1 at 2]. Mr. Williams also explains that he did not "identify it as an issue to bring to the Probation Office's attention for correction." *Id.*

The Government contends in relevant part that Defendant's "vague, conclusory complaint fails to establish ineffectiveness." [CR Doc. 103 at 23]. The court agrees with the

Government. Defendant has not shown that counsel's failure to correct the alleged errors listing two victims in the PSR fell below the standard of reasonableness. Nor is the court persuaded that, but for counsel's alleged unprofessional errors, Defendant would have received a different sentence.

Defendant next argues in Ground IV that his attorney "failed to reasonably investigate, prepare and present the omission of the [Defendant's] mental health and mental health history" in the PSR. [CR Doc. 68 at 20]. He more particularly argues that counsel "failed to seek a mental health evaluation" as requested by Defendant, "despite having ample evidence of potentially mitigating mental health issues" and in violation of 18 U.S.C. §§ 3552(a) and (c). *Id.* at 21. Defendant alleges that his "mental health issues are partially the result of prolonged drug and alcohol abuse in [his] early teenage years." *Id.* He claims he sought treatment for drug and alcohol abuse at the age of 18 by attending narcotics anonymous and alcoholics anonymous after having his license suspended from a DUI. *Id.* He states that he went through family counseling as a teenager in an attempt to deal with the various mental issues. *Id.* He also alleges that the early and unexpected passing of his parents has negatively impacted his mental health. *Id.*

Even assuming Defendant timely provided evidence of his "mental health and mental health history" to counsel, Defendant has not explained how the evidence is "potentially mitigating" or what a mental health evaluation would reveal. "That a defendant suffers from some degree of mental illness or disorder does not necessarily mean that he is incompetent to assist in his own defense." *United States v. DeShazer*, 554 F.3d 1281, 1286 (10th Cir. 2009). The standard of competency to plead guilty is the same as the standard of competency to stand trial. *See Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). "The test for competency is 'whether [defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" *McGregor v. Gibson*, 248 F.3d 946, 957 (10th Cir. 2001) (quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)).

Defendant graduated from high school and completed college courses. *PSR* at ¶ 55. At the time of his arrest, he was operating a lawn company. *PSR* at ¶ 56. Prior to that point, he was

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employed by a car dealership as a parts manager. *Id.* At the change of plea hearing, after mentioning his medications, Defendant was asked if he felt his mind was free and clear. He answered in the affirmative. Defendant denied having ever been confined in a hospital for mental care or mental observation, and further denied being treated by a doctor for mental illness. Neither the Magistrate Judge nor defense counsel identified any reason to question Defendant's competence during the change of plea hearing, and the Magistrate Judge found Defendant was competent.

Likewise, the undersigned is convinced that Defendant was competent at the sentencing hearing. The PSR was reviewed by the court prior to sentencing. The "mental and emotional health" paragraph of the PSR shows Defendant was prescribed Effexor by physicians at the county jail "as a mood stabilizer and anti-depressant," and that prior to his detention, Defendant "had never been diagnosed with any mental health disorder, nor had he ever been prescribed any mental health medications." *PSR* at ¶ 53. The court did not observe any low level of intellectual functioning or other mental deficit in open court. The observations of this court are also reinforced by the observations of defense counsel. Counsel's affidavit states: "At no time during my representation did I discern mental health issues suffered by [Defendant] that would affect his ability to understand the proceedings or the consequences of pleading guilty. Nor did I identify any mental health issues that would justify a mitigating circumstance for sentencing purposes." [CR Doc 103-1 at 3].

Defendant has failed to show that he was incompetent at any relevant time in the criminal proceedings or that his decision to plea was not made knowingly and voluntarily. Defendant has not demonstrated that counsel's performance was deficient under the circumstances. And, Defendant has not demonstrated any resulting prejudice under *Strickland*. He has not shown that "potentially mitigating mental health issues" or a mental health evaluation would have changed his sentence.

Defendant also asks the court "to grant the [Defendant] a lateral departure" from his sentence. [CR Doc. 68 at 26]. He contends that a 60-month sentence would be more appropriate under the circumstances. Defendant refers to "his lack of significant prior criminal history, his genuine remorse of his crime, and his awareness of the harmful effects of his crime." *Id.*

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Defendant alleges in his reply that he "naively entered into the Plea Agreement/Contract because of the shame he felt and to save his family any further embarrassment," and "he felt that a 10[-]year sentence with 15 years of supervised release was a just sentence." [CR Doc. 109 at 20]. But he also argues that, once he "was able to conduct his own research into similar cases in a law library, it quickly became apparent how heavy-handed and disproportionate his sentence was, especially in light of other defendants having thousands more images and videos in his possession." *Id.*

A lesser sentence under the guidelines would be expected if the grand jury had returned a single-count Indictment charging Defendant with Possession of Certain Material Involving the Sexual Exploitation of Minors. In the case at hand, Defendant was charged with two crimes, and he now turns a blind eye to Count One. Defendant is confident that, had he gone to trial, he would not have been convicted of Sexual Exploitation of Children, in violation of 18 U.S.C. § 2251(a) (Count One). What is clear, however, is that if Defendant had gone to trial, and if Defendant was convicted on Count One, or Counts One and Two, his sentence would have been much longer than his agreed-upon Rule 11(c)(1)(C) sentence. Under the circumstances, counsel clearly provided effective assistance to Defendant. A plea deal was negotiated and the Government agreed to dismiss one of the counts. That the parties agreed to a 120-month sentence under Rule 11(c)(1)(C) is not surprising, and Defendant's claim that the sentence is "heavy-handed and disproportionate" to other cases is unavailing.

Defendant briefly alleges in two of his affidavits that "the cumulative effects of counsel's failures amount to [c]onstitutionally deficient counsel." [CR Doc. 68 at 6, 11]. "Cumulative error is present when the 'cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.'" *Workman v. Mullin*, 342 F.3d 1100, 1116 (10th Cir. 2003) (quoting *Duckett v. Mullin*, 306 F.3d 982, 992 (10th Cir. 2002)). Because Defendant has not successfully demonstrated error in the claims, his cumulative error argument also fails.

Defendant filed other motions which are also pending before the court. He filed a motion to compel (entitled "motion to compel defense counsel to surrender his billing hours and statements in the above styled action to the defendant in this case") [CR Doc. 101]. Defense counsel joined the Federal Public Defender's Office in 2016, roughly two years before he

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entered an appearance in this case for Defendant. Counsel is not a CJA panel attorney, who would keep track of billing hours. Moreover, as evidenced by assertions set forth by Defendant later in his reply, counsel provided a copy of his file to Defendant.[6] Defendant's motion to compel [CR Doc. 101] should be denied as moot.

Also before the court are a motion for discovery and motion for production of documents [CR Doc. 102], and a second motion for production of documents [CR Doc. 106] and brief in support [CR Doc. 107]. "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." *See* Rule 6(a) of the Rules Governing Section 2255 Proceedings. "Good cause is established 'where 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.'" *Wallace v. Ward*, 191 F.3d 1235, 1245 (10th Cir. 1999) (quoting *Bracy v. Gramley,* 520 U.S. 899, 908–09, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997)). Defendant failed to provide the court with specific allegations showing reason to believe that the requested discovery would produce information supporting his claims. *See United States v. Moya–Breton,* 439 Fed.Appx. 711, 716 (10th Cir. 2011) (unpublished). Further, as noted above, it appears Defendant was able to obtain copies of various documents from counsel or other sources.[7] The court does not find good cause to allow discovery. Defendant's requests for discovery [CR Docs. 102 and 106] should be denied.

Defendant filed a second motion to compel (entitled "Petitioner's motion to compel judgement pursuant to Federal Rule of Civil Procedure, Rule 12(c)") [CR Doc. 117]. Defendant "avers that all pleadings are closed-out and that this case is ripe for judgement in the [Defendant]'s favor." *Id.* at 1. Because the court now issued its order denying Defendant's

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[6] For example, Defendant specifically refers to notes from Mr. Williams "taken during one of the [Defendant]'s first meetings with him and made available by discovery." [CR Doc. 109 at 2].

[7] For example, Defendant alleges in his second discovery motion [CR Doc. 106] that the Government only mailed page 3 of counsel's affidavit [CR Doc. 103-1] to Defendant with the Government's response. Later, in his "Affidavit 5" [CR Doc. 116 at 1], Defendant specifically refers to various lines on page 2 of counsel's affidavit, indicating he no longer needs a complete copy of the document.

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§ 2255 motion, as amended, Defendant's second motion to compel [CR Doc. 117] should be denied as moot.

Lastly, Defendant recently filed a motion for appointment of counsel [CR Doc. 121]. Though a district court *may* appoint counsel under 18 U.S.C. § 3006A, Defendant's claims are not legally or factually complex. Defendant's request for counsel should be denied.

A certificate of appealability may issue only if a habeas petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). When a district court denies a § 2255 motion on the merits, a petitioner "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). Upon consideration, this court finds that the standard has not been satisfied. This court hereby declines to issue a certificate of appealability.

Defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence [CR Doc. 68; CV Doc. 1], as amended [CR Doc. 118], is hereby DENIED.[8] Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, this court hereby declines to issue a certificate of appealability.

Defendant's motion for discovery and motion for production of documents [CR Doc. 102], second motion for production of documents [CR Doc. 106], and motion for appointment of counsel [CR Doc. 121], are DENIED. Defendant's motions to compel [CR Docs. 101 and 117] are DENIED as moot.

It is so ordered this 23rd day of February, 2023.

Ronald A. White

THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA

[8] The motion, files and records of this case conclusively show that Defendant is entitled to no relief. Thus, no evidentiary hearing was held.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	DOC. #42
	)	
v.	)	**Case No. CR-18-50-RAW**
	)	
RYAN EDWARD OFFINEER,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

The Defendant Ryan Edward Offineer was indicted herein for sexual exploitation of children in violation of 18 U.S.C. § 2251(a), and possession of material involving the sexual exploitation of minors in violation of 18 U.S.C. § 2252(a)(4)(B). The evidence supporting these charges was seized from his home, his person, and his vehicle pursuant to three search warrants issued by this Court. The Defendant seeks suppression of much of this evidence because: (i) statements that he made after being arrested and asserting his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966) were unconstitutionally obtained; (ii) incriminating evidence was seized from his vehicle pursuant to a search warrant not supported by probable cause; and (iii) search of a laptop computer found in his vehicle should be have been supported by a separate search warrant under *Riley v. California,* 573 U.S. ___, 134 S. Ct. 2473 (2014). The Defendant's Motion to Suppress Evidence [Docket No. 33] was referred for a report and recommendation pursuant to 28 U.S.C. § 636(b)(2)(B), and a suppression hearing was conducted on July 25, 2018. For the reasons

set forth below, the undersigned Magistrate Judge herby recommends that the motion to suppress be GRANTED IN PART and DENIED IN PART.

As an initial matter, the undersigned Magistrate Judge finds that any incriminating statements made by the Defendant in response to questioning after he asserted his rights under *Miranda* rights should be suppressed. The government did not address this point in its response brief, but did concede at the suppression hearing that it was not contesting suppression of the statements. The undersigned Magistrate Judge therefore recommends that the motion to suppress be granted to this extent.

The remaining arguments as to suppression relate to incriminating evidence seized from the Defendant's vehicle pursuant to a search warrant obtained upon affidavit by a special agent of the Department of Homeland Security. The affiant averred, *inter alia*, that the vehicle in question was a 2008 Nissan Titan registered to the Defendant and his wife, and that the Defendant was confirmed as the operator of the vehicle on February 28, 2018, when he provided his driver's license after being pulled over by a Muldrow police officer. *See* Defendant's Ex. 1, p. 20, ¶ 30-31. The affiant also discussed information related to a website that had been accessed between September 2015 and April 2017 and from which explicit materials had been purchased through the Defendant's email address, including the Defendant's name, address, and phone number by way of the payment processor. *Id.* at ¶¶ 13, 15, 23-24. A second payment processor also identified purchases in the name of the Defendant and with his address. *Id.* at ¶ 26. The affiant also indicated that he knew the Defendant had a cell phone, and believed he "could also have a portable electronic device,"

allowing him to access the internet and explicit materials away from his residence, and that a search of the Defendant's premises, vehicle, and person would likely result in discovery of these devices, leading to evidence and possibly victims. *Id.* at ¶¶ 36, 39. Regarding the execution of the search warrant, the affiant testified that he knew the Defendant would be departing the residence and there was a *likelihood* that he would have an electronic device with him that related to the investigation. Upon leaving the house, the Defendant was detained by a Muldrow police officer on a traffic stop and informed of the search warrants. Officers removed the Defendant from his vehicle and took it back to his residence, where it was then searched. During the search a laptop computer was seized, which was likewise subsequently searched.

The Defendant first argues that the affidavit supporting the vehicle search warrant fails to establish probable because it does not demonstrate a sufficient nexus between the alleged contraband and the Defendant's vehicle. Assuming *arguendo* that this is so, the undersigned Magistrate Judge is nevertheless satisfied that the good-faith exception provided in *United States v. Leon*, 468 U.S. 897 (1984) applies to execution of the search warrant herein and that the evidence seized pursuant thereto need not be suppressed. *See, e. g., United States v. Quezada-Enriquez*, 567 F.3d 1228, 1234 (10th Cir. 2009) ("Because the good faith exception applies and requires affirmance, it is not necessary for us to decide if the warrant was supported by probable cause."), *citing United States v. Danhauer,* 229 F.3d 1002, 1005 (10th Cir. 2000) ("[C]ourts have the discretion to proceed directly to an analysis of the good-faith exception without first addressing the underlying Fourth

Amendment question."). Under *Leon*, there are generally four situations in which the good-faith exception *does not* apply: (i) when the issuing judge is misled by an affidavit containing false information or information that the affiant would have known was false if not for his reckless disregard of the truth; (ii) when the issuing judge wholly abandons the judicial role and essentially "rubber stamps" the warrant application; (iii) when the affidavit in support of the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[;]" and, (iv) when the warrant is so facially deficient that the executing officer could not reasonably believe it was valid. 468 U.S. at 922-23. At the suppression hearing, the Defendant argued only that the third situation applied to this case, *i. e.*, that the affidavit underlying the vehicle search warrant was so lacking in evidence to establish a nexus between the evidence to be seized and the Defendant's vehicle that the officers executing the warrant could not reasonably believe that it was valid.[1]

With regard to the application of the good-faith exception, only a minimal nexus between the place to be searched and the suspected criminal activity or the evidence to be seized is required. *See, e. g., United States v. Gonzalez,* 399 F.3d 1225, 1231 (10th Cir. 2005) ("We agree with the Sixth Circuit that good faith may exist when a minimal nexus between the place to be searched and the suspected criminal activity is established."), *citing*

[1] The Defendant acknowledged at the suppression hearing that neither of the first two *Leon* situations apply to this case. Nor is there anything to suggest that the fourth situation applies, *i. e.*, that the warrant itself (as distinguished from the supporting affidavit) was so facially deficient that any belief in its validity was unreasonable, *e. g.*, failure to particularize the place to be searched or things to be seized. *See Leon,* 468 U.S. 923.

United States v. Carpenter, 360 F.3d 591, 595-596 (6th Cir. 2004) ("The affidavit in the case before us failed to provide a substantial basis for probable cause because it did not provide the required nexus between the residence and the illegal activity. However, the affidavit was not completely devoid of any nexus between the residence and the marijuana that the police observed . . . We therefore conclude that reasonable officers could have believed that the affidavit as submitted, even without the additional relevant information known to the officers, was sufficient to support the issuance of the warrant."). Nevertheless, "[f]or good faith to exist, there must be *some* factual basis connecting the place to be searched to the defendant or suspected criminal activity." *United States v. King,* 2014 WL 12623360, at *5 (W.D. Okla. July 30, 2014) [emphasis added]. Here, there was such a factual basis; the affidavit established both a connection between the Defendant and the alleged criminal activity, and the likelihood of portability of the evidence or criminal activity. And although the affiant's "training and experience" were arguably insufficient to establish sufficient nexus for probable cause to search the Defendant's vehicle, it was nevertheless sufficient to provide the minimal nexus required to support application of the good-faith exception, particularly in light of the existence of probable cause to believe the Defendant had committed a crime, that he was connected to the vehicle, and that he possessed and used a cell phone (and other potentially portable devices). *See, e. g., United States v. Schultz*, 14 F.3d 1093, 1098 (6th Cir. 1994) ("As previously discussed, Officer Ideker certainly had probable cause to believe that Schultz had committed a crime. Moreover, although we have held that his "training and experience" were not sufficient to

establish a nexus of probable cause between that crime and the safe deposit boxes, the connection was not so remote as to trip on the "so lacking" hurdle."). The undersigned Magistrate Judge therefore finds that the executing officers reasonably relied upon the issuance of the vehicle search warrant, that the *Leon* good-faith exception to exclusion of the evidence seized from the vehicle applies to this case, and that such evidence need not be suppressed. *See, e. g., United States v. Corleto*, 2009 WL 274488, at *9-10 (D. Utah Feb. 5, 2009) (declining to decide "whether the affidavit provided a sufficient nexus between the contraband to be seized or suspected criminal activity and the place to be searched to support a finding of probable cause" because "the information provide[d] the minimal nexus warranting application of the *Leon* good-faith exception."). The undersigned Magistrate Judge therefore recommends that the Defendant's motion to suppress be denied to the extent it is premised upon any perceived deficiency of the underlying search warrant.

The Defendant also argues that even if the laptop computer was properly seized, it should not itself have been searched absent a separate search warrant. The Defendant relies in this regard upon *Riley v. California,* 573 U.S. ___, 134 S. Ct. 2473 (2014), in which the Supreme Court held that a warrant was required to search a cell phone seized incident to an arrest. *See* 573 U.S. at ___, 134 S. Ct. at 2495 ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple--get a warrant."). The Defendant would apparently view his laptop computer as analogous to the cell phone in *Riley* and essentially contends that all searches of such portable devices

must be authorized by a warrant and specifically directed to such devices. The undersigned Magistrate Judge is not persuaded, however, that *Riley* can be so expansively read. *See, e. g.,* 573 U.S. at ___ , 134 S.Ct. at 2494 ("Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone."). The warrant in this case authorized the search for and seizure of evidence capable of being stored on a laptop computer, *i. e.*, images of child pornography or child erotica regardless of how stored, so the executing officers needed no further authorization to search the Defendant's computer. *See King*, 2014 WL 12623360, at *3 ("A computer search, however, may be as extensive as reasonably required to locate the items described in the warrant based on probable cause."), *citing United States v. Burgess*, 576 F.3d 1078, 1092 (10th Cir. 2009). *See also United States v. Salazar*, 2014 WL 12788972, at *3 (D.N.M. Aug. 14, 2014) ("If the cell phones were found in the Defendant's home, the officers could have searched them pursuant to the warrant."); *Corleto*, 2009 WL 274488, at *12 ("As noted above, the home warrant allowed for the search and seizure of a number of items regardless of whether they were stored magnetically, electronically, or on paper. Based on this language, the Court finds that the officers had the ability to search for those items mentioned in the warrant that were electronically stored on the computers and phone."). Thus, *Riley* is clearly inapposite to the facts of this case, and the undersigned Magistrate Judge therefore recommends that the Defendant's motion to suppress be denied to the extent it is premised upon the notion that a warrant specifically directed to a search of the laptop computer was required by *Riley*.

In summary, the undersigned Magistrate Judge finds that any statements made by the Defendant in response to questioning after his arrest and assertion of his right under *Miranda*, should be suppressed, but any evidence seized from the search of his vehicle or the subsequent of his laptop computer found in the vehicle should not be suppressed.

Accordingly, the undersigned hereby PROPOSES the findings set forth above and RECOMMENDS that the Defendant's Motion to Suppress Evidence [Docket No. 33] be GRANTED IN PART and DENIED IN PART. Any objections to this Report and Recommendation must be filed within fourteen (14) days.

IT IS SO ORDERED this 3rd day of August, 2018.

Steven P. Shreder
United States Magistrate Judge
Eastern District of Oklahoma

Doc. #137

FILED
United States Court of Appeals
Tenth Circuit

February 20, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RYAN EDWARD OFFINEER,

Defendant - Appellant.

No. 23-7019
(D.C. No. 6:20-CV-00007-RAW &
6:18-CR-00050-RAW-1)
(E.D. Okla.)

ORDER

Before **MATHESON**, **BRISCOE**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Petitioner "Appendix A"

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Ryan Edward Offineer — PETITIONER
(Your Name)

VS.

United States of America — RESPONDENT(S)

PROOF OF SERVICE

I, Ryan Offineer, do swear or declare that on this date, _____, 20___, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Assistant United States Attorney - Clay Compton; 520 Denison Ave.; Muskogee, OK. 74401

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 10, 2024

Ryan Offineer
(Signature)