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APPENDIX E

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10077

FERRELL WALKER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 7:22-cv-00108-HL-TQL

ORDER:

Ferrell Walker is a federal prisoner serving a 168-month sentence after being convicted of possession of child pornography while on supervised release. He filed a *pro se* 28 U.S.C. § 2255 motion, raising four grounds: (1) trial counsel did not timely move to suppress the evidence and statements obtained during a search of Walker's residence; (2) trial counsel failed to object to the conflation of lay and expert testimony at trial; (3) trial counsel did not object to prosecutorial misconduct; and (4) trial counsel failed to object to prosecutorial vindictiveness. The district court denied the motion, and Walker now moves this Court for a certificate of appealability ("COA"), as construed from his notice of appeal, and leave to proceed *in forma pauperis* ("IFP").

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court denied a habeas petition on substantive grounds, the petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted).

To prove ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient if it falls below the wide range of competence demanded of attorneys in criminal cases. *Id.* at 687-88. To make such a showing, a defendant

must demonstrate that no competent attorney would have acted in the same manner as his counsel. *United States v. Freixas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003). There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

As to prejudice, the defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.* Moreover, "the failure to raise nonmeritorious issues does not constitute ineffective assistance." *Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994).

Here, reasonable jurists would not debate the district court's denial of Walker's § 2255 motion. *See Slack*, 529 U.S. at 484. First, as to Claim 1, the officers had a reasonable suspicion that Walker was violating the terms of his supervised release or engaging in criminal conduct based on the totality of the circumstances. *See United States v. Yuknavich*, 419 F.3d 1302, 1311 (11th Cir. 2005). Moreover, given Walker's previous conviction for possessing child pornography, the officers had a heightened interest in searching the unauthorized cell phone, especially given that it was hidden inside a pillowcase and that Walker admitted to searching for "teen pornography" on it. *See United States v. Carter*, 566 F.3d 970, 975 (11th Cir. 2009) ("When a probationer has a condition of probation reducing his expectation of privacy, and the government has a higher

interest in monitoring the probationer due to the nature of his criminal history, a search can be permissible [under the Fourth Amendment] when supported only by reasonable suspicion."). Accordingly, because reasonable suspicion existed to justify the search, any attempt to suppress the evidence would have been futile, and counsel was thus not deficient for failing to move to suppress it. *See Bolender*, 16 F.3d at 1573.

As to Claim 2, Walker was not entitled to relief on this claim, as he failed to point to any specific testimony to which counsel should have objected, and his conclusory assertions as to the allegedly improper testimony are insufficient to state a claim of ineffective assistance of counsel. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (stating that a petitioner's conclusory statements, unsupported by specific facts or by the record, are insufficient to state a claim for ineffective assistance of counsel in a collateral proceeding). His conclusory statements that their testimony drew inferences meant for the jury, and that he was therefore prejudiced, fail to establish counsel's deficient performance. *See id.*

As to Claim 3, even assuming that the government made improper statements at trial and that counsel was deficient in failing to object, Walker could not establish prejudice in light of the overwhelming evidence of his guilt. *See Strickland*, 466 U.S. at 694. At trial, the government presented evidence establishing that: (1) the cell phone found in Walker's pillowcase contained over 1,000 images of child pornography; (2) the cell phone contained nude images of Walker that he had taken himself, a picture of his

drivers' license, and sexually explicit chats with identifying details that Walker admitted were accurate as to him; and (3) after the cell phone was discovered, Walker admitted to using the cell phone "to search for teen pornography webcam sites." Thus, even assuming deficient performance, Walker failed to establish prejudice.

Lastly, as to Claim 4, Walker did not point to any specific evidence that would indicate prosecutorial vindictiveness, nor did he demonstrate that the government had offered a pretextual justification for the allegedly retaliatory action. *See United States v. Jones*, 601 F.3d 1247, 1261 (11th Cir. 2010) (stating that a defendant can demonstrate actual prosecutorial vindictiveness if he can show that the government's justification for a retaliatory action is pretextual). Moreover, based on the facts alleged in his § 2255 motion, the government merely offered him a lesser sentence as an incentive to accept its plea offer, rather than go to trial, and thereafter requested a sentence at the top of his guideline range after he proceeded to trial, which is permissible. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Because he failed to establish prosecutorial vindictiveness, counsel was not deficient for failing to raise a meritless objection, and no COA is warranted on this claim. *See Bolender*, 16 F.3d at 1573.

Accordingly, in light of the above, Walker's motion for a COA is DENIED. His motion for IFP is also DENIED as moot.

UNITED STATES CIRCUIT JUDGE

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10077

FERRELL WALKER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 7:22-cv-00108-HL-TQL

Before BRANCH and LAGOA, Circuit Judges.

BY THE COURT:

Ferrell Walker, a federal prisoner seeking a certificate of appealability in order to appeal the district court's denial of his *pro se* 28 U.S.C. § 2255 motion to vacate, has filed a motion for reconsideration of this Court's June 21, 2024, order denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed *in forma pauperis*. Upon review, Walker's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.[1]

[1] To the extent that the Clerk's Office has construed a second motion for leave to proceed *in forma pauperis* from Walker's motion, that motion is DENIED AS MOOT.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

FERRELL WALKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

28 U.S.C. § 2255 Case No.
7:22-CV-108 (HL)

Criminal Case No.
7:17-CR-34 (HL)

ORDER

Before the Court is the Recommendation of United States Magistrate Judge Thomas Q. Langstaff. (Doc. 92). The Magistrate Judge recommends denying Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Doc. 80). The Magistrate Judge also recommends denying Petitioner a certificate of appealability.

Petitioner filed objections to the Recommendation along with a second Motion to Expand the Record, which contains additional affidavits executed by Petitioner. (Docs. 95, 96).[1] This Court has fully considered the record in this case and made a *de novo* determination of the portions of the Recommendation to which Petitioner objects. The Court overrules Petitioner's objections and accepts and adopts the Recommendation in full. The Court **DENIES** Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Doc. 80).

[1] The Court **GRANTS** Petitioner's Motion to Expand the Record. (Doc. 96).

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The Court further finds no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Therefore, a Certificate of Appealability is denied.

SO ORDERED, this 1st day of December, 2023.

s/ Hugh Lawson
HUGH LAWSON, SENIOR JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

FERRELL WALKER,	:	
	:	
Petitioner,	:	
	:	
	:	
VS.	:	**28 U.S.C. § 2255 Case No.**
	:	7 : 17-CR-34 (HL)
	:	
UNITED STATES OF AMERICA,	:	**Criminal Case No.**
	:	7 : 22-CV-108 (HL)
	:	
	:	
Respondent.	:	

ORDER and RECOMMENDATION

Petitioner's Motion to Vacate, Set Aside, or Correct his sentence pursuant to 28 U.S.C. § 2255, filed on the docket on October 6, 2022 (Doc. 80), is before this Court for the issuance of a recommendation of disposition pursuant to Rule 8 of the Rules Governing Section 2255 Proceedings for the United States District Courts. Also pending is Petitioner's Motion to Expand the record. (Doc. 81).

Procedural History

On August 23, 2007, Petitioner was charged by means of an Information with one (1) count of possession of child pornography in *United States v. Walker,* No. 7 : 07-CR-30 (M.D.Ga.) (HL). Petitioner pled guilty to one (1) count of possession of child pornography and was sentenced to 87 months imprisonment, followed by 25 years of supervised release. *Id.*

While on supervised release, Petitioner committed the offense that underlies this criminal

proceeding, and the U.S. Probation Office moved to have his term of Supervised Release revoked in Case No. 7 : 07-CR-30. On November 15, 2017, Petitioner was charged herein by means of an Indictment with one (1) count of possession of child pornography. (Doc. 1). Represented by appointed counsel Nicole Williams, Petitioner was found guilty following a jury trial. (Doc. 34). On December 12, 2018, the Court sentenced Petitioner to 168 months imprisonment followed by supervised release for life. (Docs. 44, 46).[1] The Sentencing Guideline imprisonment range was 135 months to 168 months. (Doc. 43, ¶ 56).

Petitioner appealed his conviction herein, as well as the revocation of supervised release in his 2007 case. (Doc. 48). The Eleventh Circuit consolidated the appeals, and affirmed Petitioner's 2018 conviction. (Doc. 68). Petitioner's Motion to Vacate was filed with the Court on October 6, 2022. (Doc. 80). Petitioner raises the following grounds for relief:

1. Counsel was ineffective in that she did not file a timely Motion to Suppress;

2. Counsel was ineffective in that she did not object to the conflating of lay and expert testimony;

3. Counsel was ineffective in that she did not object to prosecutorial misconduct; and

4. Counsel was ineffective in that she did not object to prosecutorial vindictiveness.

Id.

ORDER

In his Motion to Expand the record, Petitioner seeks to submit what he has characterized as his "affidavits". (Doc. 81). This motion is **GRANTED**. The Court notes that these statements

[1] Although not the subject of this Motion to Vacate, Petitioner's term of Supervised Release was revoked in Case No. 7:07-CR-30 based on the conduct underlying this Indictment.

satisfy the declarations requirements set forth in 28 U.S.C. § 1746.

RECOMMENDATION

Evidentiary Hearing

Petitioner bears the burden of establishing that an evidentiary hearing is needed to dispose of his § 2255 motion. *Birt v. Montgomery*, 725 F.2d 587, 591 (11th Cir. 1984). "A federal habeas corpus petitioner is entitled to an evidentiary hearing if he alleges facts which, if proven, would entitle him to relief." *Futch v. Dugger*, 874 F.2d 1483,1485 (11th Cir. 1989). The Court is not required to hold an evidentiary hearing, however, where the record makes "manifest the lack of merit of a Section 2255 claim." *United States v. Lagrone*, 727 F.2d 1037, 1038 (11th Cir. 1984). "[If] the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schirro v. Landrigan*, 550 U.S. 465, 474 (2007). The record herein is sufficient to evidence that Petitioner's claims lack merit, and therefore no evidentiary hearing is necessary as to his grounds.

Facts

In its March 10, 2021 Order, the Eleventh Circuit recited the following facts:

> In 2007, Walker pled guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Walker accessed this pornography digitally, on a personal computer in 2005. His sentence for that conviction included a 25-year term of supervised release, which he began serving in May 2014.
>
> In September 2017, the government searched Walker's home and found a cellphone in his bedroom, inside a pillow case on his bed. Over one thousand child pornography images were found on the cellphone. The phone also contained a photograph of Walker's driver [sic] license and a nude photograph that Walker had taken of himself. The cellphone included a sexually explicit "chat" from a messaging application in which the user of the phone sent a photo of Walker's face and of male genitalia.

> In November 2017, Walker was arrested on a warrant for violations of his conditions of supervision. That same month, a grand jury charged Walker with possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), based on those materials the government found on his cellphone that September.
>
> . . .
>
> In July 2018, Walker was tried before a jury on the 2017 incident of possession of child pornography. Over two days, the jury heard testimony about the cellphone the government found at Walker's home, including that it contained child pornography. The jury heard evidence indicating that Walker personally accessed the phone. The evidence also included testimony that Walker admitted to a law enforcement officer that he used this phone to search for pornography featuring teens. The government admitted evidence of Walker's 2007 conviction for possession of child pornography as well.
>
> But Walker also presented evidence that someone other than he may have used the phone to access child pornography. . .
>
> The jury nevertheless convicted Walker of possession of child pornography.

(Doc. 68, pp. 3-5).

Legal Standard

Section 2255 provides that:

> a prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> 28 U.S.C. § 2255.

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If a prisoner's § 2255 claim is found to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.*

Discussion

In order to establish that his counsel's representation was constitutionally defective, the Petitioner must show (1) that his counsel's representation was deficient, and (2) that the Petitioner was prejudiced by his counsel's alleged deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Smith v. Wainwright*, 777 F.2d 609, 615 (11th Cir. 1985).

"Our role in collaterally reviewing [] judicial proceedings is not to point out counsel's errors, but only to determine whether counsel's performance in a given proceeding was so beneath prevailing professional norms that the attorney was not performing as 'counsel' guaranteed by the sixth amendment." *Bertolotti v. Dugger*, 883 F.2d 1503, 1510 (11th Cir. 1989).

The *Strickland* court stated that "[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697.

> [A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. . . . *It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . [rather][t]he 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*

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> *confidence in the outcome*. . . . In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

Strickland, 466 U.S. at 693-694, *emphasis added.*

"As to counsel's performance, 'the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'" *Reed v. Sec'y. Fla. Dep't. of Corr.*, 593 F.3d 1217, 1240 (11th Cir. 2010) (quoting *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009)). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). In order to find that counsel's performance was objectively unreasonable, the performance must be such that no competent counsel would have taken the action at issue. *Hall v. Thomas*, 611 F.3d 1259, 1290 (11th Cir. 2010). "The burden of persuasion is on a petitioner to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable." *Chandler v. U.S.*, 218 F.3d 1305, 1313 (11th Cir. 2000).

1. Failure to file a Motion to Suppress – Ground 1

In Ground 1, Petitioner asserts that his trial counsel was ineffective in failing to file a motion to suppress the evidence and statements obtained as a result of the search of his residence by U.S. Probation officers on September 20, 2017. In order to establish ineffective assistance of counsel based on a failure to file a motion to suppress, "a petitioner must prove (1) that counsel's representation fell below an objective standard of reasonableness, (2) that the Fourth Amendment claim is meritorious, and (3) that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Zakrzewski v. McDonough*, 455 F.3d

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1254, 1260 (11th Cir. 2006).

In regard to the revocation of Petitioner's term of Supervised Release in Case No. 7 : 07-CR-30, the Court held an evidentiary hearing on May 9, 2018. (Case No. 7 : 07-CR-30, Doc. 126). Petitioner stipulated to certain Supervised Release violations, and the Court heard testimony and received evidence on other violations. Testimony from Russell Brown, U.S. Probation Officer, established that Petitioner began his term of Supervised Release on May 16, 2014, and that one condition of his release prohibited him from possessing any smartphone or device that could access the internet. *Id.* at p. 8. Following a traffic stop in Lowndes County, Georgia on September 6, 2017, Petitioner was charged and arrested for Driving on a Suspended License. *Id.* at Doc. 102. At the time of his arrest, Petitioner was in possession of a Samsung cellular telephone. *Id.* Two weeks after Petitioner's arrest, on September 20, 2017, U.S. Probation officers conducted a search of Petitioner's residence. *Id.*

During the search of Petitioner's house on September 20, 2017, Officer Brown questioned Petitioner about the Samsung cellphone found in his possession during the prior traffic stop, and Petitioner initially told Officer Brown that he had lost that cellphone. *Id.* The Samsung cellphone was later located inside a pillowcase on Petitioner's bed. *Id.* A subsequent search of the phone revealed over a thousand images of child pornography. *Id.* at Doc. 126, p. 36. In November 2017, Petitioner was indicted on a new charge of possession of child pornography.

At the time of the September 20, 2017 search of Petitioner's residence, Petitioner was on Supervised Release in Case No. 7 : 07-CR-30 and was subject to the following condition:

> You shall submit your person, property, house, residence, vehicle, papers, computers (as defined by 18 U.S.C. § 1030(e)(1)[)], other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of

> release. The Defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

(Case No. 7 : 07-CR-30, Doc. 101-1).

Petitioner voluntarily waived his right to a hearing and to assistance of counsel and agreed to the addition of this condition on February 24, 2017. *Id.*

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. Amend. IV. Thus, in general, law enforcement officers must obtain a search warrant, based on probable cause, before searching a suspect's home. *Payton v. New York*, 445 U.S. 573 (1980).

However, this requirement is subject to certain exceptions, including limitations and conditions placed upon probationers and supervised releasees. *United States v. Riley,* 706 F. A'ppx 956 (11th Cir. 2017). The Supreme Court has recognized exceptions to the warrant requirement "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable", one of those "special needs" being the operation of a probation, or post-incarceration supervision system. *Griffin v. Wisconsin,* 483 U.S. 868, 873 (1987). Specifically, "probationers have a diminished expectation of privacy and are subject to limitations to which ordinary citizens are free". *Riley,* 706 F. A'ppx at 959, *citing Owens v. Kelly,* 681 F.2d 1362, 1367-68 (11th Cir. 1982).[2]

[2] Courts have found that federal supervised release and probation exist on a continuum of possible punishments, and that "on the continuum of supervised release, parole, and probation, restrictions imposed by supervised release are the most severe." *United States v. Ellis,* 2005 WL 8159596 *9 (N.D.Ga. 2005). The Fourth Amendment principles supporting a search condition exception applicable to probationers "apply *a fortiori* to federal supervised release, which, in contrast to probation, is meted out in addition to, not in lieu of, incarceration." *U.S. v. Reyes,* 283 F.3d 446, 461 (2d Cir. 2002); *see also United States v. Robinson,* 2018 WL 991562 *7 (M.D.Al. 2018) (finding that the Fourth Amendment analysis regarding search conditions for probationers is "also applicable to cases involving supervised releasees, who have an even more diminished expectation of privacy.").

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In the case of a probationer or supervised releasee, subject to a search condition, officers need only have reasonable suspicion of criminal activity to search the supervised releasee's home or person. *United States v. Knights,* 534 U.S. 112, 121 (2001). Reasonable suspicion consists of "a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable". *Id.* "When making a determination of reasonable suspicion, we must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *United States v. Perkins,* 348 F.3d 965, 970 (11th Cir. 2003).

According to the search condition to which Petitioner agreed, U.S. Probation officers could search Petitioner's "person, property, house, residence, vehicle, papers, computers [], other electronic communications or data storage devices or media, or office" at any point. (Case No. 7: 07-CR-30, Doc. 101-1). The officers' search of Petitioner's home, pursuant to the search condition attached to his term of Supervised Release, was based on reasonable suspicion of criminal activity, in that Petitioner had been found in possession of an unauthorized cell phone during the preceding traffic stop, he had admitted to a violation of his supervised release conditions in the past, and his polygraph test had produced questionable results regarding his involvement in criminal activities. *Id.* at Doc. 101.

Thus, the September 20, 2017 search of Petitioner's home was not unreasonable, and a Motion to Suppress challenging the search would not have been successful. *See Brown v. U.S.,* 219 F. A'ppx 917 (11th Cir. 2007) (finding no ineffective assistance of counsel based on failure to file motion to suppress, as search was valid under multiple theories and motion to suppress would have failed).

Petitioner's contention that he was coerced into consenting to the search condition, based on

the threat of revocation of his term of Supervised Release, does not change this analysis. As found by the United States Supreme Court in *Knights,* 534 U.S. 112 (2001), it is not necessary to "decide whether [Petitioner's] acceptance of the search condition constituted consent . . . because we conclude that the search . . . was reasonable under . . . the totality of circumstances, with the [] search condition being a salient circumstance. . . The [] order clearly expressed the search condition and [Petitioner] was unambiguously informed of it. The [] condition thus significantly diminished [Petitioner's] reasonable expectation of privacy." *Id.* at 118-120; *see also Samson v. California,* 547 U.S. 843, 852 (2006) (suspicionless search of parolee did not violate Fourth Amendment, where the search conditions were "clearly expressed" and accepted by the parolee, evidenced by his signature submitting to the search conditions.); *United States v. Stuckey,* 2006 WL 2390268, *n.3 (S.D.N.Y. 2006) ("Defendant's claim that the search condition was 'coerced' has no bearing on his uncontested *awareness* of the condition, which is what informs his subjective privacy interests.").

Failure to object- Grounds 2, 3, and 4

In Grounds 2, 3, and 4, Petitioner alleges that counsel was ineffective for failing to object at trial and sentencing to various alleged violations and errors. However, "[f]ailing to make a meritless objection does not constitute deficient performance." *Davis v. United States,* 696 F. A'ppx 431, 434 (11th Cir. 2017), *citing Chandler v. Moore,* 540 F.3d 907, 917 (11th Cir. 2001); *see also Lattimore v. United States,* 345 F. A'ppx 506, 508 (11th Cir. 2009) (counsel not ineffective for failing to make a meritless objection to an obstruction enhancement); *Brownlee v. Haley,* 306 F.3d 1043, 1066 (11th Cir. 2002) (counsel not ineffective for failing to raise issues clearly lacking in merit).

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2. Expert and lay testimony

In Ground 2 Petitioner asserts that counsel was ineffective in failing to object to improper testimony at trial. Specifically, Petitioner alleges that U.S. Probation Officer Todd Garrett and FBI Agent Matthew Wagner testified at Petitioner's trial, and that both Garrett and Wagner "offered conflating Lay and Expert testimony . . . [and] [b]oth provided improper testimony by summarizing evidence, interpreting plain language, speculating, and drawing inference from evidence that the jury must draw for themselves." (Doc. 80-1, pp. 16-17).

> Rule 702 [of the Federal Rules of Evidence] provides that a witness "qualified as an expert by knowledge, skill, experience, training, or education" may provide opinion testimony where "the expert's . . . technical[] or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." . . . And Rule 701 makes clear that lay opinion testimony is admissible only if it "is . . . not based . . .on technical[] or other specialized knowledge within the scope of Rule 702."

United States v. Hawkins, 934 F.3d 1251, 1265 (11th Cir. 2019).

Petitioner provides no specific examples of the alleged conflating of lay and expert testimony by Officer Garrett and Agent Wagner.

Officer Garrett testified as an expert witness in computer forensics. (Doc. 60, pp. 15-71). Officer Garrett testified regarding the search of the Samsung cellphone found in Petitioner's residence, including the images found on the phone and email and messaging history on the phone. FBI Agent Wagner also testified for the prosecution although the record does not reflect that the government formally moved to have him considered an expert witness. Agent Wagner stated that he was a special agent with the FBI and had been involved in investigations involving child pornography. (Doc. 60, p. 78). Agent Wagner testified regarding the images found on

Petitioner's cell phone, Petitioner's email records, and Petitioner's internet searches. *Id.* at pp. 78-106; Doc. 61, pp. 6-10.

Petitioner does not point to any specific testimony from Officer Garrett or Agent Wagner that would have formed the basis of an objection from counsel under Rules 701 or 702 of the Federal Rules of Evidence. A review of Officer Garrett and Agent Wagner's testimony does not reveal either witness "summarizing evidence, interpreting plain language, speculating, [or] drawing inference from evidence that the jury must draw for themselves", as alleged by Petitioner. (Doc. 80-1, pp. 16-17).

To the extent that Agent Wagner did not testify as an expert, if testifying as a lay witness under Rule 701 of the Federal Rules of Evidence "[a] police officer may give an opinion about certain evidence if that opinion is rationally based on his personal perceptions, training, and experience." *United States v. Pubien,* 349 F. A'ppx 473, 478 (11th Cir. 2009); *see also Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., LTD.,* 320 F.3d 1213, 1223 (11th Cir. 2003) (officers may testify as lay witnesses "based upon their particularized knowledge garnered from years of experience within the field"). Agent Wagner testified to his experience as an FBI agent and his experience investigating child pornography cases, and testified based on that training and experience. Wagner testified as to his opinions about the substance of the evidence and where the information had been found, leaving the jury to determine the legal implications and the result to reach.

Under Rule 704, "[a]n expert may testify as to his opinion on an ultimate issue of fact", provided that he does not "merely tell the jury what result to reach" or "testify to the legal implications of conduct". *Montgomery v. Aetna Cas. & Sur. Co.,* 898 F.2d 1537, 1541 (11th Cir. 1990); Fed. R. Evid. 704. Officer Garrett also testified as to his opinions about the substance of

the evidence and where the information had been found, leaving the jury to determine the legal implications and the result to reach. *See United States v. Grzybowicz,* 747 F.3d 1296, 1310-1311 (11th Cir. 2014) (agent merely gave his expert opinion that defendant had taken the subject photos and later downloaded them to his computer, and did not tell the jury what to decide).

3. Prosecutorial misconduct

In Ground 3, Petitioner asserts that counsel was ineffective in failing to object to alleged prosecutorial misconduct by Assistant U.S. Attorneys ("AUSA"s) Jim Crane and Julia Bowen. Petitioner alleges that the prosecutors knowingly submitted false testimony, that AUSA Crane badgered Petitioner, and that AUSA Bowen made false statements in her closing argument.

> To find prosecutorial misconduct, a two-element test must be met: (1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant. A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would be different. The court makes this determination in the context of the entire trial and in light of any curative instructions.

U.S. v. Wilson, 149 F.3d 1298, 1301 (11th Cir. 1998), *internal citations omitted.*

"[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181 (1986), *internal citations omitted.*

"A prosecutor's remarks, suggestions, insinuations, and assertions are improper when they are calculated to mislead or inflame the jury's passions." *United States v. Azmat,* 805 F.3d 1018, 1044 (11th Cir. 2015). Petitioner's allegations of prosecutorial misconduct against AUSA Crane

concern AUSA Crane's cross-examination of Petitioner. (Doc. 61, pp. 43-75). Petitioner contends that AUSA Crane made improper comments when he: 1) accused Petitioner of lying to ICE agents in 2005, knowing said accusation to be false; 2) misled the jury regarding a conversation between Petitioner and Ms. Jolie, when never took place; 3) insinuated Petitioner had gone to a county commissioner to have the charges dropped; 4) misled the jury regarding Petitioner attempting to induce a friend to be a witness; and 5) generally attacked Petitioner's credibility. (Doc. 80-1, pp. 22-23).

Several lines of questioning or comments by prosecutors have been deemed improper, including questions relying on the accused's bad character when character has not been put in issue, questions alluding to evidence not admitted, questions attempting to bolster a witness's credibility based on the government's reputation, and discrediting defense counsel in front of the jury. *United States v. Rodriguez,* 765 F.2d 1546, 1560 (11th Cir. 1985) (bad character); *United States v. Lopez*, 590 F.3d 1238, 1256 (11th Cir. 2009) (evidence; credibility bolstering); *Zebouni v. United States,* 226 F.2d 826, 827 (5th Cir. 1955) (discrediting counsel).

However, a defendant's due process right to a fair trial is not violated unless "there is a reasonable probability or a probability sufficient to undermine confidence in the outcome, that, but for the offending remarks, the outcome of the proceeding would have been different." *Spencer v. Secretary, Dept. of Corrections*, 609 F.3d 1170, 1182 (11th Cir. 2010), *internal citations omitted.*

The Eleventh Circuit Court of Appeals has identified four (4) factors to consider in determining whether a prosecutor's conduct had a reasonable probability of changing the outcome of the trial:

(1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused;
(2) whether they are isolated or extensive;
(3) whether they were deliberately or accidentally placed before the jury; and
(4) the strength of the competent proof to establish the guilt of the accused.

Lopez, 590 F.3d at 1256.

Courts also consider the trial court's instructions and whether there was an objection by defense counsel to determine whether the remarks rendered the trial fundamentally unfair. *Spencer*, 609 F.3d at 1182.

A review of AUSA Crane's cross-examination of Petitioner does not reveal improper questioning or commentary. (Doc. 60, pp. 43-77). AUSA Crane questioned Petitioner regarding his earlier statements to law enforcement, prior to his 2007 guilty plea to possession of child pornography, and his continued denial of possession of child pornography in the present case. Crane questioned Petitioner about a conversation with a Ms. Jolie, as to which Petitioner repeatedly testified he had no recollection. *Id.* at pp. 55-57. Crane asked Petitioner about his conversation with his boss, a county commissioner, regarding having Petitioner's charges dropped, and Petitioner provided his interpretation of that set of events. *Id.* at pp. 59-64. Crane questioned Petitioner about his conversation with a potential witness regarding how many people had access to Petitioner's cellphone, and Petitioner offered his version of the conversation. *Id.* at pp. 64-68.

"By choosing to testify, [Petitioner] placed his credibility in issue as does any other witness. Thus, the government could properly demonstrate that [Petitioner's] credibility was suspect." *United States v. Melton,* 739 F.2d 576, 579 (11th Cir. 1984), *internal citations omitted.*

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AUSA Crane's questions on cross-examination were not improper, and merely tested Petitioner's veracity regarding his contentions and defenses.

Even if AUSA Crane's cross-examination of Petitioner included improper comments or questions, the overwhelming amount of evidence, over 1000 photographs of child pornography on Petitioner's cell phone, show that there is not a reasonable probability that AUSA Crane's comments altered the outcome of the trial. Additionally, Petitioner's counsel had the opportunity to clarify Petitioner's testimony on re-direct and direct, and asked Petitioner about the issues raised by AUSA Crane, providing Petitioner the opportunity to offer his version of events. (Doc. 60, pp. 77-83, 94). The Court instructed the jury that "anything that the lawyers may have said is not evidence and is not binding on you." (Doc. 61, p. 100).

In regard to AUSA Julia Bowen, Petitioner maintains that her comments during closing arguments regarding Petitioner having lied were improper. Again, even if such comments were improper, the overwhelming amount of evidence against Petitioner removes any reasonable probability that the comments altered the outcome of the trial.

4. Prosecutorial vindictiveness

In Ground 4, Petitioner alleges that counsel was ineffective for failing to object at sentencing to prosecutorial vindictiveness, based on AUSA Bowen asking for a greater sentence than what had been offered in Petitioner's proposed plea agreement. "[I]n certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to presume an improper vindictive motive. Given the severity of such a presumption, however . . . the Court has done so only in cases in which a reasonable likelihood of vindictiveness exists." *United States v. Goodwin,* 457 U.S. 368, 373 (1982).

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Petitioner argues that in the plea agreement offered by the government prior to trial, the government proposed a sentence recommendation of 120 months imprisonment. However, at sentencing, AUSA Bowen argued that Petitioner was a threat to the community and should be sentenced to 168 months imprisonment. Petitioner asserts that this increase in the government's sentence recommendation was a "clear and obvious case of 'Prosecutorial Vindictiveness'". (Doc. 80-1, p. 27). Petitioner maintains that he instructed his trial counsel to file objections to the Presentence Investigation Report, challenging the final sentence recommendation.

Petitioner's ineffective assistance of counsel claim relies on the premise that counsel should have objected to the government's sentence recommendation. At the sentencing hearing, trial counsel did argue for a lower sentence, and set out several reasons to support a lower sentence. (Doc. 63, pp. 5-7). Other than Petitioner's conclusory allegations, there is no evidence that the prosecution acted with vindictiveness in seeking a higher sentence, after Petitioner had rejected the plea deal. *Cf. Thigpen v. Roberts,* 468 U.S. 27 (1984) (presumption of prosecutorial vindictiveness arises when defendant is indicted on more serious charges while pursuing appellate or collateral relief on original charges). "Demonstrating actual vindictiveness essentially requires a showing that the prosecution's justification is pretextual. . . [Petitioner] never alleged facts . . . that, if true, would prove that the prosecution acted pretextually and with actual vindictiveness. Throughout, [Petitioner] made conclusory statements but has not provided any evidence of actual vindictiveness." *Barritt v. Secretary, Florida Department of Corrections*, 968 F.3d 1246, 1253 (11th Cir. 2020). Here, the government merely sought a higher sentence, within the Sentencing Guideline range, after Petitioner rejected a plea deal, and there is no evidence to support a conclusion that counsel would have been successful in an objection based

on prosecutorial vindictiveness.

The Supreme Court has found that "[w]hile confronting a defendant with the risk of more severe punishment may have a discouraging effect on the assertion of his trial rights, the imposition of these difficult choices [is] an inevitable – and permissible – attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Bordenkircher v. Hayes,* 434 U.S. 357, 362-64 (1978), *internal citations omitted* (cases finding prosecutorial vindictiveness based on a prosecutor bringing additional charges after a defendant attacked his conviction were "very different from the give-and-take negotiation common in plea bargaining"). Had Petitioner accepted the plea deal, the prosecution would have been bound to seek an agreed upon reduced sentence. *United States v. Hunter,* 835 F.3d 1320, 1324 (11th Cir. 2016) (government is bound by its material promises that induce a defendant to plead guilty). Without a plea agreement, the prosecution was not so bound. "It is ludicrous to suggest that a prosecutor should be deemed unconstitutionally vindictive because he or she seeks a higher sentence upon conviction after trial than the prosecutor offered in plea negotiations." *Bolton v. Palmer,* 2018 WL 5927050, *8 (W.D. Mich. 2018).

Conclusion

WHEREFORE, it is recommended that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 be **DENIED.**

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. Any objection is limited in length to TWENTY (20) PAGES. *See* M.D. Ga. L.R. 7.4. The District Judge shall make a de novo determination as

to those portions of the Recommendation to which objection is made; all other portions of the Recommendation may be reviewed by the District Judge for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

The undersigned finds no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, it is recommended that the Court deny a certificate of appealability in its Order addressing the grounds raised in this § 2255 Petition. If the Petitioner files an objection to this Recommendation, she may include therein any arguments she wishes to make regarding a certificate of appealability.

SO ORDERED and RECOMMENDED, this 11th day of October, 2023.

s/ ***Thomas Q. Langstaff***
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.