

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 16-16569-C

RAYMOND ALFRED GAGNON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA

Respondent-Appellee,

**Appeal from the United States District Court
for the Northern District of Alabama**

ORDER:

Raymond Alfred Gagnon is a federal prisoner serving a 97-month sentence after he pled guilty to possessing child pornography.¹ In 2012, this Court affirmed

¹ Consecutive to this sentence, Gagnon is serving a 200-month sentence, with a lifetime term of supervised release, after he pled guilty to other child pornography charges in the Western District of Texas.

Gagnon's conviction and sentence after his appointed counsel filed an *Anders*² brief. *United States v. Gagnon*, 501 F. App'x 909, 909-10 (11th Cir. 2012). In 2013, Gagnon filed a timely motion to vacate his sentence, pursuant to 28 U.S.C. § 2255, raising seven claims:

- (1) his counsel was ineffective for failing to move to suppress statements that he made to law enforcement officers in Vermont;
- (2) his counsel was ineffective for failing to file a motion to dismiss based on a violation of the Speedy Trial Act;
- (3) his counsel was ineffective because there was an insufficient factual basis for the plea, and any offense was outside the statute of limitations;
- (4) his counsel was ineffective for failing to inform him of the true statutory maximum penalty he faced and the effects of supervised release;
- (5) his counsel was ineffective during plea negotiations;
- (6) he was actually innocent of the crime of conviction; and
- (7) his counsel was ineffective at sentencing.

After receiving the government's response, and several filings from Gagnon, the magistrate judge issued a report and recommendation ("R&R"), recommending that Gagnon's § 2255 motion be denied on the merits.

Gagnon objected to the R&R, arguing that it should be entirely overruled because it "fails to adhere to virtually every legal standard, and ignores all facts of

² *Anders v. California*, 386 U.S. 738 (1967).

consequence.” He asserted that: (1) there was no probable cause to search his residence; (2) he was in custody when he gave a coerced confession; (3) counsel was ineffective for failing to investigate or file a motion to suppress, failing to file a motion to dismiss under the Speedy Trial Act, and for ignoring Gagnon; (4) the search warrant lacked probable cause to search for child pornography because it was based on the coerced statements and deliberate disregard of the truth by investigators; (5) the “Chumley discs” were insufficient to prosecute him because that evidence was unreasonably seized and “incompetent”; (6) the magistrate judge misapplied the *Leon*³ good-faith standard; (7) the indictment was defective because it alleged conduct outside of the statute of limitations and it did not specifically inform him of the offense conduct; (8) he received a double punishment because he was punished in Texas for the Alabama images; (9) his plea was involuntary and unknowing because he was not properly informed; (10) he was confused about the factual basis when he pled guilty; (11) the magistrate judge abused its discretion in denying him discovery; (12) he did not alter his step-daughter’s MySpace page to make it look like she met someone online; (13) investigators deliberately or recklessly provided misleading information, falsified information, and omitted relevant facts; (14) the magistrate judge ignored the derivative evidence rule of *Murray v. United States*, 487 U.S. 533 (1988), and did not understand the

³ *United States v. Leon*, 468 U.S. 897 (1984).

*Strickland*⁴ standard; (15) it was unclear whether the deleted computer images were easily recoverable; and (16) he was actually innocent. On July 29, 2015, over Gagnon's objections, the district court adopted the R&R and denied on the merits a motion to supplement the record that Gagnon had filed.

In August 2015, Gagnon moved to alter or amend the judgment, pursuant to Fed. R. Civ. P. 52(b), 59(a)(2), and (e). In that motion, he reiterated many of the arguments raised in his objections to the R&R, as well as new arguments. On the same day, Gagnon also filed a "Motion for Findings Pursuant to Rule 52(b)." Gagnon argued that the district court erred in its findings of law and fact, adopted from the R&R. He made many of the same claims that he had previously made, but also argued that: (1) the investigator coerced him into waiving his right to an attorney during his interrogation; (2) the court's determination that the "Chumley discs" possessed a massive amount of child pornography was unsupported by either the factual basis of his "misadvised" plea agreement or other reliable evidence; (3) the prosecutor perpetuated a fraud on the court because there was no evidence that Gagnon altered his step-daughter's website; and (4) the court improperly concluded that the warrant sought evidence of a sexual relationship with minors.

⁴ *Strickland v. Washington*, 466 U.S. 668 (1984).

Gagnon then filed a notice of appeal regarding his § 2255 motion. Subsequently, on October 6, 2015, the district court denied Gagnon's motion for reconsideration, filed under Rule 59(e), as an attempt to re-litigate old matters, without any additional facts or arguments. It also concluded that a Rule 52(b) motion was inapplicable. The district court further determined that, even if Rule 52 applied, there was no reason to amend its findings, make additional findings, or amend its judgment.

Gagnon objected to the district court's order, pursuant to Fed. R. Civ. P. 46. Gagnon argued that he presented new evidence that showed that the court's conclusions were obviously erroneous. He argued the merits of his claims and asserted that he filed his motion to reconsider because the magistrate judge had made his appeal unnecessarily complex. He asserted that the only reason his motions appeared to re-litigate his case was because the Court refused to take notice of the actual facts, refused to resolve factual disputes, and failed to apply the correct law. On April 14, 2016, the district court overruled Gagnon's objection and denied his motion to reconsider.

On April 19, 2016, this Court denied Gagnon's motion for a certificate of appealability ("COA") in his § 2255 proceedings. On May 12, 2016, Gagnon moved for reconsideration in that case. This Court has denied that motion for reconsideration.

On May 20, 2016, Gagnon appealed the district court's denial of his motions for reconsideration, moving for *in forma pauperis* ("IFP") status and a COA on 20 claims, including claims presented in his § 2255 motion and many of the arguments raised in his motions to the district court. He also requested a COA on several new issues. On October 28, 2016, this Court denied Gagnon leave to proceed IFP, and determined that he did not need a COA to appeal the denial of his Rule 52 motion. This appeal is currently pending before this Court.

In July 2016, Gagnon filed a Rule 60(b)(1) motion to reopen the district court's July 29, 2015, judgment denying his § 2255 motion on its merits. In his motion, he argued that the magistrate judge's R&R was convoluted, misapplied the *Leon* good-faith exception, was grounded in factual and legal errors, failed to perform required analyses, improperly denied discovery motions, and resulted in this Court erroneously affirming the district court's final judgment. Gagnon stated that he sought the correction of these errors and an evidentiary hearing. He contended that the final judgment against him should be vacated or set aside, and that discovery should occur.

The district court denied Gagnon's motion, determining that he had offered nothing new in support of his motion that he had not already presented in previous submissions and motions. The district court determined that, because Gagnon merely took issue with the R&R and the district court's subsequent adoption of the

R&R, his motion to reopen should be denied. Gagnon appealed the district court's order denying his motion to reopen and sought a COA as well as leave to proceed IFP on appeal. The district court declined to issue a COA and denied leave to proceed IFP. Gagnon now seeks a COA from this Court.

In his motion for a COA, Gagnon contends that he made a showing of fraud on the district court and reiterates his arguments regarding the "Chumley discs," contends that the court participated in fraud schemes and refused to permit access to rebuttal evidence, violated due process, refused to resolve claims (including those of prosecutorial misconduct), and abused its discretion in refusing to resolve several claims altogether. Gagnon asserted that, among others, those claims related to double jeopardy, coerced statements, being affirmatively misled by counsel, and the search warrant being tainted.

DISCUSSION:

As an initial matter, although Gagnon currently has an appeal pending relating to his § 2255 proceedings before this Court, the district court retained jurisdiction to address and deny his Rule 60(b) motion. *Mahone v. Ray*, 326 F.3d 1176, 1180 (11th Cir. 2003).

A COA is required to appeal the denial of a Rule 60(b) motion in a § 2255 proceeding. *Jackson v. Crosby*, 437 F.3d 1290, 1294-95 (11th Cir. 2006). The appeal of a Rule 60(b) motion is limited to a determination of whether the district

court abused its discretion in denying the motion. *Rice v. Ford Motor Co.*, 88 F.3d 914, 918-19 (11th Cir. 1996). “Thus, to overturn the district court’s denial of [Rule 60(b) motions], it is not enough that a grant of the motions might have been permissible or warranted; rather, the decision to deny the motions must have been sufficiently unwarranted as to amount to an abuse of discretion.” *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984).

In order to obtain a COA, a petitioner must show that reasonable jurists would find it debatable (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *See Jackson*, 437 F.3d at 1295 (applying the standard of *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) to the denial of a Rule 60(b) motion in a habeas proceeding). Where it is clear that the petitioner would not be entitled to relief under Rule 60(b), even if the district court’s procedural ruling was erroneous, the petitioner is not entitled to a COA. *Jackson*, 437 F.3d at 1295-96.

Rule 60(b) allows a party to seek relief or reopen his case based upon the following limited circumstances: (1) mistake or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment has been discharged; and (6) “any other reason that justifies relief.” Fed. R. Civ. P. 60(b).

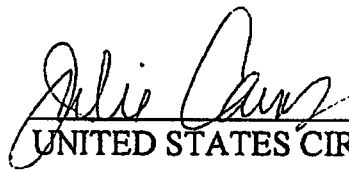
Without authorization from this Court, the district court lacks jurisdiction to consider a second or successive habeas petition. *Farris v. United States*, 333 F.3d

1211, 1216 (11th Cir. 2003). A Rule 60(b) motion from the denial of a habeas petition is considered a successive motion if it seeks to present a new ground for relief from a judgment of conviction or if it attacks the federal court's previous resolution of a claim on the merits. *See Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005). Conversely, a Rule 60(b) motion is permissible if "neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's . . . conviction." *Id.* at 533. Thus, a Rule 60(b) motion would be proper, for example, if it: (1) asserts that a federal court's previous ruling that precluded a merits determination was in error; or (2) attacks a defect in the federal proceeding's integrity, such as a fraud upon the court. *See id.* at 532-35 nn. 4-5.

Here, arguably, Gagnon's motion was properly construed as a Rule 60(b)(1) motion rather than a successive § 2255 motion because he did not present a new ground for relief from judgment. Rather, he contended that the district court did not conduct a merits determination on several of his claims and had based its conclusions on factual and legal errors. *See id.* Further, he contended that fraud, including prosecutorial misconduct, had occurred in the court. Accordingly, it would appear that Gagnon's Rule 60(b)(1) motion was not a successive § 2255 motion and the district court had jurisdiction to consider the motion.

However, Gagnon does not merit a COA. The district court did, contrary to Gagnon's assertion, address the claims that he raised in his § 2255 motion. Further, this Court examined Gagnon's claims in declining to issue a COA on Gagnon's appeal of the district court's denial of his § 2255 motion. Additionally, Gagnon has not shown any new reasons for why the reasoning of the district court or this Court was incorrect. Therefore he has not shown that mistake or excusable neglect and the district court correctly denied his Rule 60(b)(1) motion. *See* Fed. R. Civ. P. 60(b)(1). Thus, Gagnon has not made a substantial showing of the denial of a constitutional right, and the district court did not abuse its discretion in denying his motion.

Because he has failed to make the requisite showing, Gagnon's motion for a COA is DENIED.


UNITED STATES CIRCUIT JUDGE

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

RAYMOND ALFRED GAGNON,

vs.

UNITED STATES OF AMERICA.

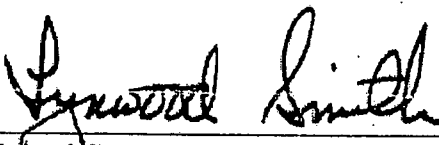
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Case No. 5:13-cv-08030-CLS-HGD

FINAL JUDGMENT

In accordance with the Memorandum Opinion entered contemporaneously herewith and Rule 58, Fed.R.Civ.P., it is ORDERED, ADJUDGED and DECREED that the Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is due to be, and it hereby is, DENIED, and this action DISMISSED WITH PREJUDICE.

~~DONE~~ and ORDERED this 29th day of July, 2015.



United States District Judge

suitability for the issuance of a certificate of appealability (COA). *See* 28 U.S.C. § 2253.

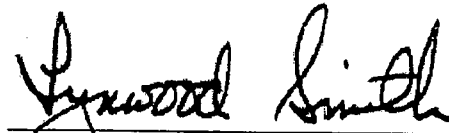
Rule 22(b) of the Federal Rules of Appellate Procedure provides that in a § 2255 proceeding, a petitioner cannot take an appeal unless a district judge issues a COA. Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating 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 were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1603-04, 146 L.Ed.2d 542 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4, 103 S.Ct. 3383, 3394-95 & n.4, 77 L.Ed.2d 1090 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right and whether the court's procedural ruling was correct. *Id.*

The Court finds that reasonable jurists could not debate its resolution of the claims presented in this § 2255 proceeding. For the reasons stated in the magistrate judge's report and recommendation, the Court **DECLINES** to issue a COA with respect to any claims. Petitioner is **ADVISED** that he may file an application to

proceed on appeal *in forma pauperis* and a request for certificate of appealability directly with the Court of Appeals for the Eleventh Circuit.

A separate order in conformity with this Memorandum Opinion will be entered contemporaneously herewith.

DONE this 29th day of July, 2015.


United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

RAYMOND ALFRED GAGNON)

vs.)

UNITED STATES OF AMERICA)

Case No. 5:13-cv-08030-CLS-HGD

REPORT AND RECOMMENDATION

Petitioner, Raymond Alfred Gagnon, has filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. He challenges the validity of his 2011 conviction for possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), based on a plea of guilty. Petitioner was sentenced to a term of imprisonment of 97 months. Petitioner also was sentenced to serve a lifetime on supervised release as a result of this conviction. He is further serving a consecutive sentence of 200 months to be followed by a term of lifetime supervised release based on an earlier plea of guilty to child pornography charges in the Western District of Texas.

Gagnon was arraigned on the charges brought against him in the Northern District of Alabama on December 22, 2009. He entered a plea of guilty to this charge on May 20, 2010, and was sentenced on December 14, 2011, by United States District Judge C. Lynwood Smith, Jr. Gagnon appealed, and his conviction and sentence

were affirmed by the Eleventh Circuit Court of Appeals on January 18, 2013.¹ In his § 2255 motion, Gagnon challenges the voluntariness of his guilty plea and raises several claims of ineffective assistance of counsel.

I. BACKGROUND FACTS

The factual basis for petitioner's plea, as set out at his plea proceeding, is as follows:

[Asst. U.S. Attorney] MS. BURRELL: Your Honor, had we gone to trial in this case, there would have been much more evidence presented than what I am going to tell the Court about today. For instance, we would have presented evidence from the state of Vermont of the defendant's interest in sex with children. We also would have presented evidence from the state of Texas regarding his possession of child pornography and transportation of child pornography out there.

Your Honor, I will tell you a little bit about the evidence that we would have presented. And the relations of the people involved in this case are convoluted. And so if I misstate them, I am sure that Mr. Gagnon will correct me about who's who in this case.

But, basically, he was interviewed on June 30th, 2008, and again on July 1st, 2008, as part of an investigation - the investigation was ongoing at that time -- regarding the disappearance of a child whose initials were B.B. She was a 12-year-old female, and she disappeared from a convenience store in Vermont.

Your Honor, it's my understanding that B.B. is Mr. Gagnon's ex-stepdaughter.

¹ Counsel appointed to represent Gagnon on appeal filed a brief asserting there were no arguable issues of merit, pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The Eleventh Circuit agreed and affirmed on this basis.

During these interviews, Gagnon advised that shortly after he learned of B.B.'s disappearance he flew from San Antonio, Texas, which was where he was living at the time, to Burlington, Vermont by way of Cullman, Alabama. According to a computerized airline inquiry, Gagnon flew into Huntsville, Alabama on June 26th, 2008, via American Airlines, and then flew from Huntsville, Alabama to Burlington, Vermont the following day on June 27th, 2008, via U.S. Airways.

Gagnon admitted that while in Cullman, Alabama he went to the Cullman Public Library to attempt to access B.B.'s Myspace account and the AMBER Alert information on her. He further admitted to possessing computers at his residence, which he owned in Cullman, Alabama.

Gagnon also admitted to engaging in sexually-explicit contact with a juvenile female in South Royalton, Vermont in June of 2007. He admitted to having the juvenile touch his penis and to inserting his -- Gagnon's -- penis into the juvenile female's mouth.

Gagnon indicated that this juvenile was not B.B. And Gagnon denied having vaginal intercourse with the juvenile female. The juvenile female has been identified. And when she was interviewed, the juvenile female said that she did, in fact, have sexual intercourse with Gagnon.

On July 2nd, 2008, a criminal complaint was filed in the United States District Court for the District of Vermont that charged Gagnon with obstruction of justice. And part of the factual basis for the allegation is that on or about June 30th, 2008, Gagnon instructed another person to dispose of a safe at his residence located in San Antonio, Texas. Gagnon stated that the safe contained a laptop computer that was used to access B.B.'s Myspace page.

In addition, Gagnon admitted that he had downloaded a vast amount of child pornography from the Internet, including approximately five years of Russian-type child pornography, and he kept the images on his laptop

computer and on hard drives, which were stored in the safe at his residence in Texas.

Gagnon admitted to possessing sexual images of children as young as five years old. Gagnon also admitted to receiving images of minors engaged in sexual acts via the e-mail.

And, Your Honor, I might point out that the criminal complaint that was filed in the United States District Court for the District of Vermont charging him with obstruction of justice has since been dismissed.

On July 2nd, 2008, Bill Barksdale, a resident of Cullman, Alabama, advised that he had seen Gagnon on the national news and wanted authorities to know that Gagnon owned a home in Cullman, Alabama. Barksdale is a former coworker of Gagnon. Barksdale further advised that Gagnon owns the residence in Cullman, Alabama. A relative of Barksdale who lives next door to the Gagnon residence indicated to recently observing Gagnon enter the residence with computers. Lowell Chumley (phonetic), who indicated that he was a friend of Gagnon and responsible for watching Gagnon's residence in Cullman, Alabama also indicated that all of the contents of Gagnon's residence in Cullman, Alabama belonged to Gagnon. A public records search indicated that Gagnon owned the residence in Cullman, Alabama. And in 2006, Gagnon obtained an Alabama driver's license that listed the residence in Cullman, Alabama as his residence.

On July 2nd, 2008, a warrant was obtained in the United States District Court for the Northern District of Alabama to search Gagnon's residence at 1628 Catherine Street, Northwest, Cullman, Alabama. When the search warrant was executed later that day, two computers were found, including a computer that contained a Seagate 80 gigabyte hard drive, with the manufacturer's label that indicates the hard drive was manufactured in China. The hard drive contained images of child pornography. The images were located in the recycle bin associated with the user profile entitled Ray. And, as Mr. Gagnon told you earlier in this hearing, he goes by the name Ray. The security identifier for the user Ray is S1521-1645522239-854245398-839522115-1003, which is

a unique identifier assigned to each user on the computer. A selection of the images of child pornography contained on the computer hard drive in Gagnon's residence can be described as follows: One image entitled, Amychild2year19preteen1.jpeg is an adult male penis being inserted into a prepubescent female vagina. Another image on this particular hard drive was entitled A12, and this is an adult hand spreading a prepubescent female labia. Another image on this particular hard drive was entitled pk81_007, and was an adult hand spreading a prepubescent female labia while the prepubescent female is laying on her back.

A computer zip disk with a manufacturing label that indicates it was manufactured in Belgium was found in the basement of the residence. The zip disk contained images of child pornography that are contained in a password-protected encrypted folder entitled jokes.zip, which also contained a folder entitled Ray. A selection of the images of child porn contained on the zip disk are as follows: There was an image entitled vin14, which is a nude female under the age of 18 sitting on a seat with her legs spread displaying her vagina, her elbows on her knees, and her hands on her face. There was another image entitled vin22, which is a nude female under the age of 18 laying face down with her buttocks in the air supported by her knees, displaying her vagina and her anus. There's another image entitled vin21, which is two nude females under the age of 18 on a couch. One of the females is laying on her back with her legs spread. The other is sitting upright with one leg and one hand touching the other female.

On July 15th, 2008, Tina and Lowell Chumley provided a box containing computer media that was found at their home. The Chumleys said that Gagnon had visited them on June 26th and 27th, 2008, because Tina's father had recently passed away. The Chumleys stated the box and its content belonged to Gagnon and was in a metal toolbox with more of Gagnon's property secured with a padlock. The Chumleys did not remember the box being at their home prior to Gagnon's visit and said that Gagnon knew where the key was hidden.

Forensics analysis of computer media on August 19th, 2008, revealed that it contained over 700 images of child pornography, 137 of which displayed either torture, humiliation, bondage, sadism, masochism, or a combination of those acts.

Search warrants were executed, like I mentioned previously, in San Antonio on computers that Gagnon owned there. And he was ultimately indicted there in the Western District of Texas for possession of child pornography and transporting child pornography. He has since been convicted there and serving 200 months on that sentence. Your Honor, and just as an aside, B.B.'s body was ultimately found in the state of Vermont. She was murdered and found buried in a shallow grave. And a man named Michael Jacques, who is some kind of relation by marriage to Mr. Gagnon, has been charged with capital murder in federal court in the District of Vermont.

And we would have presented evidence that Mr. Jacques and Mr. Gagnon had a common interest and shared their common interest of child sex and child pornography with each other.

THE COURT: Mr. Gagnon, did you hear and clearly understand everything that Ms. Burrell just stated in your presence?

THE DEFENDANT: Yes.

THE COURT: Are her statements and the facts contained in those statements substantially correct?

THE DEFENDANT: Yes.

(Doc. no. 38 in *United States v. Gagnon*, Case No. 5:08-cr-00363-CLS-HGD, Plea Transcript, at 25-32).

II. CLAIMS

Petitioner raises the following claims:

Claim 1: Counsel was ineffective for failing to move to suppress his statements given to law enforcement officers in Texas and Vermont.

Claim 2: Counsel was ineffective for failing to file a motion to dismiss for violation of the Speedy Trial Act.

Claim 3: Counsel was ineffective because (A) there was an insufficient factual basis to believe he had committed any offense and (B) any offense which may have been committed was outside the statute of limitations.

Claim 4: Counsel was ineffective because he was not advised of the true statutory maximum penalty he faced nor the effects of supervised release.

Claim 5: Defense Counsel was ineffective in plea negotiations.

Claim 6: Petitioner is actually innocent of the crime of conviction.

Claim 7: Counsel was ineffective at sentencing.

(Doc. no. 2, Memorandum of Law in Support of § 2255 Motion, at 10-44).

III. DISCUSSION

A. Claim 1

Petitioner alleges that he received ineffective assistance of counsel because she failed to move to suppress statements made to law enforcement personnel in Vermont. Petitioner asserts that the information obtained from these statements was used in the search warrant that was issued on July 2, 2008, and executed on his residence in

Cullman, Alabama, resulting in the seizure of computers belonging to him which contained images of child pornography.

In particular, Gagnon was interviewed by personnel from the Vermont State Police on June 30, 2008. He was questioned in regard to the disappearance of B.B., the 12-year-old daughter of Gagnon's ex-wife. The interview came about when he was asked to voluntarily come to the police barracks. He was advised before the interview began of his *Miranda* rights and that he was not under arrest and could leave at any time. During the interview, Gagnon admitted to receiving oral sex from a 13-year-old female, "A.R.," who was the stepdaughter of Michael Jacques, the person later accused of the murder of B.B. Thereafter, he was asked about whether he asked a friend, Kevin Grosenheider, to destroy some computer equipment, to which he responded "Can I have a lawyer?" According to the police report of this interview, the officer interviewing Gagnon stated as follows:

Gagnon was told that I was disappointed that he was not taking advantage of an opportunity to clear up his involvement in this investigation (into [B.B.]'s disappearance). I made a comment that he was in it "up to his eyeballs." Gagnon agreed with me. I made it clear to him that I did not want to violate his rights and that if wanted a lawyer, I would get him one, but to be certain of his choice because once I did, that would end my day. I expressed my concern that [B.B.] was still alive and I wanted to find her.

I told him I would re-read him his rights if he wanted to talk with me again. I asked again if he wanted time to think about his decision; I

asked him to be careful with what he does with his life and he said "I think my life is gone."

I told him I was trying to help him. He replied, "Let's keep talking." I told him I was going to go over his Miranda warnings again because I was not there to violate his rights.

I pulled out the original Miranda Warnings sheet and explained that if he wanted to waive his rights again, I'd like him to read along with me and at the end if he wanted, he could waive his rights in writing. I again read him his Miranda warnings and he again said he understood. I asked him to sign his name at the bottom if he agreed, and to initial each line of the Miranda warnings sheet. He did do this.

(Doc. no. 17-1 at 13-14).

A review of the subject search warrant reflects that it contains several paragraphs of information gleaned from Gagnon after he asked if he could have a lawyer. Except for his admission regarding having received oral sex from "A.R.," which occurred before he asked for a lawyer, this includes all the information contained in paragraph 33 through the third sentence of paragraph 37 of the search warrant. Included in these paragraphs is information from Gagnon that one of his computers contained approximately five years' worth of "Russian" type child pornography. The probable cause statement concluded with an assertion that a neighbor of Gagnon had recently seen Gagnon in Cullman at his residence carrying in computers.

On its face, the search warrant affidavit contains probable cause to search Gagnon's residence for the computers. However, if the offending paragraphs are removed, petitioner argues that it does not. Based on this, he asserts that his attorney was ineffective for failing to investigate whether the admissions by Gagnon contained in the affidavit were obtained in violation of the law and, that, had she challenged the statements, they would have been suppressed and the information would have had to be deleted from the search warrant, resulting in a lack of probable cause to search his residence.

There are a variety of problems with this claim. First, a review of the Vermont State Police report reflects that Gagnon was not in custody at the time he asked for a lawyer. In fact, he was specifically told he was not in custody and that he was free to leave. It is well settled that one who is not in custody is not entitled to counsel. Therefore, the police may continue asking the suspect questions, even if he asks for an attorney during the interrogation, as long as the statements are voluntary. *Minnesota v. Murphy*, 465 U.S. 420, 424 n.3, 104 S.Ct. 1136, 1140 n.3, 79 L.Ed.2d 409 (1984). Although not reflected in the police report, petitioner alleges that the atmosphere in Vermont was coercive. This is an unresolved issue. However, as explained below, it is unnecessary to address it.

Suppression is an appropriate remedy only if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.² *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). There is no evidence that the FBI Special Agent who obtained the search warrant in Alabama was aware that petitioner had asserted his right to counsel during his questioning in Vermont or that it was obtained through any type of coercion. Petitioner asserts that the agent must have read the Vermont State Police report, which also notes that he asked for a lawyer, because the information contained in that report is also contained in the search warrant affidavit. That may or may not be the case, and this also remains an unresolved issue. However, the determination of this issue, for reasons explained below, is also unnecessary.

² There is also no evidence that the information used in the warrant was false and included with a reckless disregard for the truth. However, if it were obtained in violation of petitioner's rights under either the Fifth or Sixth Amendment, its inclusion in the search warrant would have been improper use of "fruit of the poisonous tree." Under the so-called "fruit of the poisonous tree" doctrine, evidence obtained by the use of other evidence obtained through an illegal search or seizure must be suppressed. See *Fahy v. State of Conn.*, 375 U.S. 85, 91, 84 S.Ct. 229, 232, 11 L.Ed.2d 171 (1963) (holding that "petitioner should have had a chance to show that his admissions were induced by being confronted with the illegally seized evidence"); see also *Amador-Gonzalez v. United States*, 391 F.2d 308, 318 (5th Cir. 1968) (holding a "confession, resulting from [an unlawful] seizure and . . . subsequent narcotics arrest, was the 'fruit of the poisoned tree' and therefore inadmissible"), overruled on other grounds by *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987).

There also is no evidence that petitioner's counsel was aware that petitioner had asked for an attorney during his interrogation in Vermont. Trial counsel for petitioner submitted an affidavit wherein she states:

My representation of Mr. Gagnon pertained to an offense that took place in the Northern District of Alabama. I knew that Mr. Gagnon had been questioned in Vermont, and had given statements and tried to cooperate with the authorities in Vermont after the death of his stepdaughter. He was initially charged with obstruction in Vermont, however, that was subsequently dismissed.

Mr. Gagnon and I never discussed his meetings with authorities in Vermont, other than about information that he said he tried to give. He never discussed any details or alleged any facts surrounding what he now alleges were "interrogations" by officials there. He never mentioned anything about being forced, threatened, or coerced in any way. Based on what he told me, it was then, and still is my opinion that any discussions he had had with authorities in Vermont, or statements he made in Vermont in no way had an impact on his case in the Northern District of Alabama.

After reviewing the discovery and discussing it and the case in detail with Mr. Gagnon, I saw nothing to support his claim now that I should have filed a Motion to Suppress based on his interrogation in Vermont. I disagree with Mr. Gagnon's assertion that he could have had "all of the charges against [him] dismissed had a proper motion to suppress been filed . . ." (Page 2 of Sworn Statement of Raymond Gagnon)

Again, in the Petition is the first I have ever heard of any alleged coerced or illegal "interrogations" of Mr. Gagnon that he says took place in Vermont.

(Doc. no. 12-1, Affidavit of Katherine P. Luker, ¶ 2, at 7-8).

Despite the fact that he failed to tell his lawyer about his request for counsel in Vermont, petitioner alleges that trial counsel should have done more investigation into the facts behind the Vermont statements used in the search warrant affidavit and that her failure to do so amounted to ineffective assistance. Even assuming that most of the information given to the Vermont State Police is inadmissible because petitioner appropriately invoked his right to counsel and that this information was improperly included in the search warrant in Alabama, the evidence obtained is not necessarily due to be suppressed. Even where an affidavit fails to establish probable cause for the warrant, the evidence may be saved by the good faith exception established by *United States v. Leon*, 468 U.S. 897, 922, 104 S.Ct. 3405, 3420, 82 L.Ed.2d 677 (1984).

Leon “stands for the principle that courts generally should not render inadmissible evidence obtained by police officers acting in reasonable reliance upon a search warrant that is ultimately found to be unsupported by probable cause.” *United States v. Martin*, 297 F.3d 1308, 1313 (11th Cir. 2002). The *Leon* good faith exception has been explained as follows:

The *Leon* good faith exception applies in all but four limited sets of circumstances. The four sets of circumstances are as follows: (1) “the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth”; (2) “where the issuing

magistrate wholly abandoned his judicial role in the manner condemned in” *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); (3) where the affidavit supporting the warrant is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable”; and (4) where, depending upon the circumstances of the particular case, a warrant is “so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.”

Id. (quoting *Leon*, 468 U.S. at 923, 104 S.Ct. at 3421).

There is no evidence in this case that the FBI agent/affiant was aware that the information in the affidavit obtained in Vermont was illegally obtained or that he included it with a reckless disregard for that fact. However, as noted above, petitioner asserts that it was, and such a determination would, under certain circumstances, require a hearing to resolve. However, no hearing is necessary.

A review of the affidavit without the offending material reflects that it is not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Even with this material removed, there is evidence that petitioner had a sexual relationship with a 13-year-old female in conjunction with Michael Jacques, who was subsequently suspected in the disappearance of petitioner’s 12-year-old ex-stepdaughter. Furthermore, there is evidence that the missing child had an online MySpace page that was accessed after she disappeared and altered from a computer located at the residence of another friend of petitioner’s

to make it look as though she were abducted by someone she met online. This same friend advised investigators that Gagnon had instructed him to dispose of a safe he had left at this residence, which he did. Finally, there is evidence that, shortly after this occurred, petitioner traveled from Texas to Vermont, where the child had disappeared, with a stop at his residence in Alabama where he was observed taking in some computers. It is not unreasonable to conclude that these computers may have contained information related to petitioner's sexual relationship with minors and with Michael Jacques, the main suspect in the disappearance of a minor. Consequently, any claim that the affidavit, without the allegedly illegally obtained information, was totally lacking in any indicia of probable cause is clearly without merit. Therefore, the search is valid under *Leon, supra*. In fact, even without the offending evidence, it appears that there is sufficient probable cause to justify the search even without the application of the *Leon* exception.

Any hearing with regard to the search warrant executed in this case is also unnecessary for the following reasons. To succeed on an ineffective-assistance claim, a petitioner must show that (1) his counsel's performance was deficient, and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Under the deficient performance prong, the petitioner must show that his attorney's representation fell

below an objective standard of reasonableness. *Id.* at 687-88, 104 S.Ct. at 2064. To establish prejudice, the petitioner must prove that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Because the petitioner must satisfy both prongs of *Strickland* in order to prevail, a court need not address the performance prong if he has not shown prejudice, and vice versa. *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000).

Under the facts of this case, and the circumstances outlined above, it is clear that, even if counsel had filed a motion to suppress and the offending parts of the affidavit were removed, the motion would have been denied and the outcome would have been the same, either because there still would have been sufficient probable cause to justify the search or because there was a sufficient basis for a good faith exception under *Leon*. See *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Therefore, this substantive claim is without merit. Counsel cannot be ineffective for failing to raise a meritless issue. *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000).

In addition, assuming that counsel should have filed a motion to suppress, prejudice would have to be demonstrated. The prejudice inquiry is focused on

whether, if counsel had not performed ineffectively, Gagnon still would have pled guilty. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). “When a defendant alleges that his counsel failed ‘to investigate or discover potentially exculpatory evidence, the determination whether the error “prejudiced” the defendant . . . will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea.’” *Price v. United States*, 456 Fed.Appx. 795, 797 (11th Cir. 2012) (quoting *Hill*, 474 U.S. at 59). “This depends ‘in large part on a prediction whether the evidence likely would have changed the outcome of the trial.’” *Id.* (quoting *Hill*, 474 U.S. at 59). Thus, the prejudice inquiry in such circumstances “will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial.” *Hill*, 474 U.S. at 59; *see also, e.g., Price*, 456 Fed.Appx. at 798; *Gaedtke v. Secretary, Dep’t of Corr.*, 369 Fed.Appx. 12, 18-19 (11th Cir. 2010); *Cruz v. United States*, 188 Fed.Appx. 908, 914 (11th Cir. 2006).

Even if a motion to suppress had been filed and were successful in excluding the evidence found at Gagnon’s Cullman home, the charge against him, one count of possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B), would have remained viable based on other evidence unrelated to the search warrant. At his plea proceeding, petitioner agreed that the factual basis as stated by the prosecutor was

correct. During the course of presenting the factual basis for the plea, the prosecutor stated as follows:

On July 15, 2008, Tina and Lowell Chumley provided a box containing computer media that was found in their home. The Chumleys said that Gagnon had visited them on June 26th and 27th, 2008, because Tina's father had recently passed away. The Chumleys stated the box and its contents belonged to Gagnon and was in a metal toolbox with more of Gagnon's property secured with a padlock. The Chumleys did not remember the box being at their home prior to Gagnon's visit and said that Gagnon knew where the key was hidden.

Forensic analysis of computer media on August 19th, 2008 revealed that it contained over 700 images of child pornography, 137 of which displayed either torture, humiliation, bondage, sadism, masochism, or a combination of those acts.

(Doc. no. 38 in *United States v. Gagnon*, Case No. 5:08-cr-00363-CLS-HGD, Plea Transcript, at 30-31). Thus, there was other evidence besides that seized under the search warrant sufficient to prosecute petitioner.

As a result, petitioner cannot demonstrate that, but for his attorney's failure to move to suppress the search warrant, he would have decided to go to trial. According to trial counsel, petitioner made it clear from the first time she met him that he wished to enter a plea of guilty and to attempt to provide substantial assistance to authorities in Vermont with regard to the prosecution of Michael Jacques for the death of petitioner's stepdaughter, in the hope of receiving a downward departure for substantial assistance. In that regard, petitioner, with the assistance of trial counsel,

prepared a proffer to be presented to the authorities in Vermont regarding the assistance that he could provide.

In his first affidavit, petitioner states that, had he known that he could have had all charges against him dismissed if a proper motion to suppress had been filed, he never would have pled guilty. (Doc. no. 1, Ex. 1, Aff. of Petitioner). However, as noted above, even if the motion had been successful, the charges against him would not have been dismissed. The remaining evidence was ample evidence of his guilt.

Petitioner also attempts to dispute the evidence that he had sole access to the media containing child pornography and the existence of the images on the media taken from his residence. He asserts that others had access to the area where they were found and the alleged pornographic images had been deleted years earlier and he, therefore, had no intention of "possessing" child pornography by continuing to possess the media on which they were once stored. However, at his plea hearing, petitioner was asked if the statement of facts by the prosecutor was correct and he answered under oath, that it was. (See Doc. no. 38 in *United States v. Gagnon*, Case No. 5:08-cr-00363-CLS-HGD, Plea Transcript, at 32). There is a strong presumption that a defendant's statements at the plea colloquy were truthful, including his representation that he understood the consequences of his plea. *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994). "[A] defendant who seeks reversal of

his conviction after a guilty plea . . . must show a reasonable probability that, but for the error, he would not have entered the plea.” *United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S.Ct. 2333, 2340, 159 L.Ed.2d 157 (2004). He has failed to do so with regard to this claim.

The evidence proffered by the United States put petitioner in possession of the media turned over to the government by the Chumleys. This media contained over 700 images of child pornography. Petitioner already had pled guilty in federal court in Texas to possession of child pornography involving over 7000 images. Had he gone to trial, the evidence of the Texas prosecution would have been admissible against him pursuant to Rule 404(b), Fed.R.Evid. Under these circumstances, and his purported defenses to these charges notwithstanding, there is no reasonable probability that, but for trial counsel’s failure to file a motion to suppress the computer evidence, he would not have entered his plea of guilty. Therefore, any error by trial counsel has not resulted in any prejudice under *Strickland, supra*. Therefore, this claim is without merit.

B. Claim 2

Petitioner alleges that trial counsel was ineffective for failing to file a motion to dismiss for violation of the Speedy Trial Act. The Speedy Trial Act mandates that a trial commence within 70 days after the date the defendant appeared before a

judicial officer or the date of the indictment, whichever occurs later. 18 U.S.C. § 3161(c)(1). Excluded from the 70 days are periods of delay resulting from a continuance where the district court sets forth, either orally or in writing on the record, its reasons for finding that the ends of justice are served by the continuance and outweigh the best interest of the public or the defendant in a speedy trial. 18 U.S.C. § 3161(h)(7)(A); *see also Zedner v. United States*, 547 U.S. 489, 498-99, 126 S.Ct. 1976, 1983-84, 164 L.Ed.2d 749 (2006). However, the Act specifically states that “[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.” 18 U.S.C. § 3162(a)(2); *see also United States v. Tenorio-Angel*, 756 F.2d 1505, 1508 (11th Cir. 1985).

Gagnon signed a consent waiver of the Speedy Trial Act provisions and never moved for dismissal prior to the entry of his guilty plea. A review of the court docket sheet reveals that more than 70 days already had elapsed at the time trial counsel asked him to sign the waiver. Thus, had counsel moved for dismissal under the Act, the trial court would have been required to oblige. However, to succeed on this issue in a collateral challenge, petitioner must demonstrate that trial counsel’s failure to move to dismiss the indictment for this reason was deficient performance on her part and resulted in prejudice to petitioner.

In petitioner's first sworn declaration, he asserts that, prior to the entry of his guilty plea, trial counsel brought him a Speedy Trial Act waiver to sign. He states that counsel told him that the Government wanted to debrief him about the activities of Michael Jacques in Vermont, and that this could result in a lower sentence for him. According to petitioner, counsel advised him that this waiver was necessary to facilitate the debriefing. She did not inform him that the Speedy Trial clock already had expired and stated that, had he known, he would not have signed the waiver. Furthermore, he stated that no one from the Government ever came to interview him. (Doc. no. 1-1, Aff. of Petitioner, ¶ 1, at 1).

In a second sworn statement, filed after the Government filed its response to the § 2255 petition, Gagnon claimed that, in September 2013, after he filed his § 2255 petition, trial counsel admitted to him that she had no strategic reason to have him execute a Speedy Trial waiver and that she stated it was of no benefit to him whatsoever. He further claims that counsel admitted that she deliberately misrepresented the terms and importance of the Speedy Trial waiver and made untrue statements to him to get him to sign it, knowing full well the Act had been violated and that, had she filed a motion to dismiss, the indictment against him would have been dismissed. He also stated that counsel told him that she misled him in order to earn future favor from the U.S. Attorney's Office at his expense. (Doc. no. 15-1,

Second Sworn Statement of Petitioner, ¶¶ 1-3, at 1-2). Given that petitioner was incarcerated in a ~~federal~~ facility in Bastrop, Texas, at the time trial counsel supposedly made these damning admissions, it is unclear exactly how petitioner managed to communicate with her.

In any event, the following month, counsel for petitioner submitted a sworn affidavit in which she states that, from the time she first met petitioner, he expressed his desire to plead guilty and to provide information to the Government regarding the murder case in Vermont dealing with his stepdaughter. She advised petitioner that, if he were able to provide substantial assistance, it could put him in a position for a reduced sentence. However, she states that she never told Gagnon that he could not get the benefit of a possible sentence reduction unless he waived his right to a speedy trial. She states that the waiver was executed because he had advised he did not want to go to trial and wanted to work something out with the Government, including cooperation. The waiver was executed in order to allow the parties time within which to continue their efforts toward cooperation and toward a plea. (Doc. no. 12-1, Aff. of Katherine Luker, at 5-6).

Counsel further stated that, before petitioner executed the waiver, it was discussed in detail with him, including specifically reviewing the code sections, 18 U.S.C. §§ 3161-3174, which she provided him. According to Luker, Gagnon never

voiced any concern about signing the waiver and advised that he completely understood it. There was never any discussion about challenging the timing of the execution of the waiver and never any discussion about seeking to have the indictment dismissed. (*Id.* at 6).

Despite the differences in their respective affidavits, there are some areas of agreement. Counsel states that Gagnon is correct when he asserts that no one from the Government ever came to interview him in Alabama. According to counsel, after numerous phone calls and emails to and from the prosecutor, she was advised that the agents and prosecutors from Vermont were not willing to come to Alabama to meet with Gagnon. However, officials in Vermont wanted to know about certain matters and she posed a series of questions for Gagnon to answer. She met with Gagnon and they discussed at length some of the things the Vermont officials wanted to know. (*Id.*).

Thereafter, counsel also worked with Gagnon to put together a proffer that was completed and executed on August 31, 2010. It dealt with information petitioner had regarding Vermont, Michael Jacques, and other information he had obtained while he was in custody. This information was provided to the prosecutor who disseminated it to various law enforcement agencies. None of the information provided by Gagnon was determined to be sufficient to proceed in further

investigation. As a result, no motion for a downward departure was filed. (*Id.* at 6-7). Nonetheless, ~~it is clear~~ that at least some of the delay is attributable to petitioner's attempt to cooperate with law enforcement authorities.

A review of the record reflects that, at the time the waiver was filed, the Speedy Trial Act clock had expired by 13 days. Five days later, the trial court was advised that Gagnon wished to enter a plea and a plea hearing was set for two weeks after, on April 8, 2010. The hearing was re-set twice with petitioner finally entering his plea on May 20, 2010, 76 days after the Speedy Trial clock had expired.

Had counsel for petitioner moved to have the indictment dismissed for this Speedy Trial Act violation, the district court would have been obligated to dismiss the indictment. *See* 18 U.S.C. § 3162(a)(2). A district court has the discretion to dismiss an indictment with or without prejudice under the Speedy Trial Act and must consider three factors when determining the method of relief: (1) "the seriousness of the offense"; (2) "the facts and circumstances of the case which led to the dismissal"; and (3) "the impact of a re-prosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(2). "[T]he proper dismissal sanction ~~to be~~ imposed in each case is a matter left to the exercise of the sound discretion of the trial judge after consideration of the factors enumerated in the statute." *United States v. Knight*, 562 F.3d 1314, 1322 (11th Cir. 2009); *United*

States v. Russo, 741 F.2d 1264, 1267 (11th Cir. 1984). “Where the crime charged is serious, the [district] court should dismiss [with prejudice] only for a correspondingly severe delay.” *Russo*, 741 F.2d at 1267; *see also United States v. Williams*, 314 F.3d 552, 561 (11th Cir. 2002).

Had a motion to dismiss been made, the trial court would have been justified in dismissing the indictment without prejudice based on the first factor alone. There is no question that child pornography is a serious crime, *see United States v. Pugh*, 515 F.3d 1179, 1198-99 (11th Cir. 2009), especially where, as here, the pornography depicts children being subjected to torture, humiliation, bondage, sadism, masochism, and a combination of those acts.

Also, part of the reason for the delay was related to the efforts of trial counsel to obtain information from petitioner that would be of substantial assistance to the authorities in Vermont and elsewhere. Part of the time was spent answering a series of inquiries from Vermont and part was spent putting together a proffer to be sent to law enforcement agencies regarding information that petitioner could provide. While none of this was fruitful, it does not mean that the time spent doing so is not due to be considered in deciding which type of dismissal is appropriate.

Likewise, there is no evidence that the relatively short (76-day) delay that occurred in this case had any detrimental effect on petitioner’s ability to defend

himself against these charges or locate witnesses which would be beneficial to his defense.

Under the circumstances, including the seriousness of the charged offense, the minimal degree of delay, and the lack of record evidence of prejudice to Gagnon from the delay or that the government actively sought delay, dismissal without prejudice generally would be the appropriate remedy for any Speedy Trial Act violation. *See United States v. Jones*, 601 F.3d 1247, 1257 (11th Cir. 2010); *Bramlett v. United States*, 404 Fed.Appx. 363, 368 (11th Cir. 2010); *Chambliss v. United States*, 384 Fed.Appx. 897, 899 (11th Cir. 2010); *Milligan v. United States*, 213 Fed.Appx. 964, 965 (11th Cir. 2007). Consequently, a competent attorney representing Gagnon reasonably could have decided that filing a motion to dismiss on speedy trial grounds would have only delayed further the resolution of the charges against Gagnon and was not in Gagnon's best interests. Thus, even if the Speedy Trial Act was violated here, Gagnon's trial counsel's failure to move to dismiss the indictment was not objectively unreasonable. Likewise, he has not demonstrated that he was prejudiced by trial counsel's actions. Petitioner has failed to demonstrate a reasonable probability that the result of the proceeding would have been different. If this case had been dismissed under the Speedy Trial Act, as noted, the dismissal would have been without prejudice, and petitioner unquestionably would have been

re-prosecuted. Because there is no reasonable probability that dismissal would have resulted in a different outcome, he cannot establish resulting prejudice. Therefore, Gagnon's ineffective assistance of counsel claim fails.

C. Claim 3

Petitioner also asserts that trial counsel was ineffective for failing to challenge the factual basis and for failing to seek dismissal of the indictment under the statute of limitations. Gagnon alleges that any offense he may have committed is outside the statute of limitations because the Government's forensic report showed that the computer had not been accessed for more than three years. According to Gagnon, the pornographic files had been deleted even prior to that.

However, the offense petitioner was charged under has no statute of limitations. See 18 U.S.C. § 3299 ("Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense under section 1201 involving a minor victim, and for any felony under chapter 109A, 110 (except for section 2257 and 2257A), or 117, or 1591."). The charge against petitioner, which is under § 2252A, is set out under chapter 110.

Second, at his plea hearing, petitioner admitted, under oath, that he possessed these images. There is a strong presumption that statements made during the plea colloquy are true. *United States v. Gonzales-Mercado*, 808 F.2d 796, 800 n.8 (11th

Cir. 1987).³ Furthermore, while petitioner points out that the pornographic images found on one of the computers were located in the recycle bin, they were still located on the computer and capable of being easily retrieved. The images were in a recycle bin associated with the user profile "Ray," a name used by petitioner. Even if he did not "possess" these images because they had been deleted by him years earlier,³ there are still the massive number of images recovered from the media provided by the Chumleys, separate and apart from that found on the computers seized from petitioner's residence. While some, or perhaps all, of these images had been deleted, petitioner admits that he is the one who deleted them. (Doc. no. 2, Brief of Petitioner, at 32). Therefore, he cannot claim not to have known the images were there.

Thus, if trial counsel had challenged the factual basis of or sought to dismiss the indictment on these grounds, she would not have been successful. She cannot be ineffective for failing to take steps that are, themselves, meritless.

D. Claim 4

Petitioner claims that trial counsel was ineffective because he was not advised of the true statutory maximum penalty he faced nor the effects of supervised release. However, a review of the record reflects that petitioner was informed that the

³ In this regard, see *United States v. Hill*, 750 F.3d 982, 987 (8th Cir. 2014) (images found in computer's recycle bin counted as "images" of child pornography possessed by defendant).

maximum sentence he faced was either 10 years, or 20 years if his sentence was subject to enhancement for a prior conviction of a similar offense. (Doc. no. 38 in *United States v. Gagnon*, Case No. 5:08-cr-00363-CLS-HGS, Plea Transcript, at 8-9, 16-17).

Gagnon asserts that this information was not accurate because, if he violates his supervised release, he faces additional prison time. At the time of his plea, the trial court advised petitioner:

THE COURT: In addition to those sanctions, following your release from any term of imprisonment, you will be placed under the supervision of a United States probation officer. The term or length of that supervision cannot be less than five years, or 60 months, and it could be as long as your natural life.

And, finally, I'm required to impose a special assessment fee in the amount of \$100.

Do you have any questions about the range of punishment I have just outlined for you?

THE DEFENDANT: No, sir.

(*Id.* at 9-10).

Although petitioner couches this claim in terms of ineffective assistance of counsel, his actual complaint is that the trial court failed to advise him that, if he violated the terms of his supervised release, he could be imprisoned. He did not raise this issue on direct appeal. When a defendant fails to pursue an available claim on

direct appeal, it will not be considered in a motion for § 2255 relief unless he can establish cause for the default and actual prejudice resulting from the alleged error. *United States v. Frady*, 456 U.S. 152, 162-66, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994). Petitioner has shown neither cause nor prejudice for failing to raise this issue on direct appeal. Therefore, this claim is procedurally defaulted.

However, petitioner's assertion of ineffective assistance related to this claim is also without merit as he has failed to explain why knowledge of all the requirements of supervised release would have caused him to demand a trial rather than plead guilty. *See United States v. Arlen*, 947 F.2d 139, 146 (5th Cir. 1991) (holding that a defendant complaining of having received at the plea hearing incomplete information concerning the effect of supervised release could not complain inasmuch as he failed to explain "why knowledge of all the requirements attendant to supervised release would have caused him to go to trial rather than enter a plea."); *see also Hill*, 474 U.S. at 59, 106 S.Ct. at 370 ("In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.")

Furthermore, in *United States v. Bejarano*, 249 F.3d 1304, 1307 (11th Cir. 2001) (*per curiam*), the Eleventh Circuit held that advising the defendant of the maximum possible sentence that he faced and that the defendant's sentence would include a period of supervised release, did not result in a violation of the defendant's substantial rights by the court's failure to inform the defendant at his plea colloquy of the specific term of supervised release required by statute. It stands to reason that if the failure to advise a defendant as to the specific term of supervised release he faces does not affect his substantial rights, neither does the failure to advise him as to the specific term of imprisonment he could face if he violated the terms of his supervised release.

In this case, petitioner was told that he faced a period of up to life on supervised release. He was thereafter asked if he had any questions about this and he responded that he did not. Under these circumstances, it was reasonable for trial counsel to assume that petitioner understood that he faced additional imprisonment if he violated the terms of his supervised release, and her actions in this regard were not deficient. Therefore, this claim is without merit.

Gagnon also argues that he was misinformed because, should he violate his supervised release, he would be subject to a life sentence. This is simply incorrect.

Pursuant to 18 U.S.C. § 3583(e)(3), petitioner faces a maximum of five years' additional imprisonment if he violates his supervised release.

E. Claim 5

Petitioner next claims that trial counsel was ineffective in plea negotiations. However, petitioner pled guilty without the benefit of a plea agreement in this case. The real gist of petitioner's complaint is that trial counsel was ineffective for letting him enter a plea without an agreement when there was no benefit to him for doing so. However, the record shows that petitioner entered his plea of guilty with the understanding that, if he could provide substantial assistance to the government, he could receive a downward departure at sentencing. He agreed to pursue this path. The fact that he was unable to provide useful information and ultimately did not receive a downward departure does not diminish the fact that he pled guilty in order to attempt to reduce his potential sentence. Had he insisted on going to trial, it is unlikely that the Government would have been willing even to consider a downward departure.

Furthermore, trial counsel advised that she did perform research and investigation of the case for possible defenses. She also discussed the case with petitioner and reviewed the evidence with him. (Doc. no. 12-1, Aff. of Katherine Luker, at 5). Nonetheless, this is in direct contradiction to petitioner's second sworn

affidavit wherein he claims that trial counsel admitted, among other things, that she misled him in order to earn future favor from the U.S. Attorney's Office, at the expense of his rights, and that she did no factual or legal investigation on his case. Indeed, if petitioner's second sworn affidavit is to be believed, trial counsel confessed to being totally and completely ineffective and sold petitioner "down the river" in order to curry favor with the U.S. Attorney's Office and because she found the charges against him to be repugnant. While it stretches credulity to think that any attorney would make such a complete blanket admission of ineptitude to a defendant, the court is not allowed to make credibility determinations based on affidavits. Looking at the facts of this case objectively, and even assuming petitioner's counsel to have been deficient in her performance, there also must be a showing that he was prejudiced by this deficiency.

Despite trial counsel's alleged lack of investigation, there is no doubt that petitioner possessed child pornography. He admitted this without equivocation at the time of his plea. He was asked if he understood the factual basis and he acknowledged that he did. Thus, any investigation by trial counsel would have merely confirmed what he admitted during his plea colloquy.

In addition, Gagnon contends that he was allowed to plead guilty to possessing images that had been deleted from his computer more than three years earlier and

from 3 ½-inch “floppy” disks more than four years previous. Because he had deleted them, he asserts that he no longer “knowingly possessed” them. However, by merely deleting the images, petitioner has exercised control over them. *See United States v. Shiver*, 305 Fed.Appx. 640, 643 (11th Cir. 2008) (citing *United States v. Romm*, 455 F.3d 990, 1000-01 (9th Cir. 2006) (observing that deleting images is a form of exercising control over them)). Because there is no statute of limitations for this offense, it is irrelevant how long it may have been since petitioner possessed these images in the sense that he viewed them, printed them or sent them to others.

In any event, petitioner’s argument cannot be reconciled with the record. At his plea hearing, he admitted that he possessed child pornography. He possessed the images prior to deleting them and he is the one who deleted them. Therefore, he exercised control over them. The failure to investigate these facts resulted in no prejudice to petitioner. Therefore, this claim is without merit.

F. Claim 6

In his next claim, petitioner asserts that he is actually innocent of the crime of conviction because the child pornography seized on his computer was last accessed on September 16, 2001. He also asserts that a number of the images did not meet the federal definition of child pornography because they were, among other things, “legal artistic images, legal nudist images and deleted images.” (Doc. no. 2, Brief of

Petitioner, at 35). However, as discussed above, the fact that certain images were deleted by petitioner or were moved to the computer recycle bin, does not relieve him of culpability for possessing them. Likewise, even assuming some of the images on the computer were not child pornography, many were and he admitted as much, under oath, at his plea hearing. Furthermore, nowhere in his brief or evidentiary submissions does petitioner set out or otherwise demonstrate how many remaining images there are that constitute child pornography. As a result, there is no way to determine if it would have made any difference whatsoever on the sentencing guidelines range or his potential sentence. Consequently, there is no basis to claim that trial counsel was ineffective for failing to raise the issue that some, but not all, of the images were child pornography. Therefore, this claim is without merit.

G. Claim 7

Petitioner also alleges that he received ineffective assistance of counsel at sentencing due to trial counsel's failure to object to his lifetime term of supervised release or that he could be imprisoned for a violation of the terms of his supervised release. He also asserts that trial counsel was ineffective for failing to put on testimony regarding physical abuse he was subjected to as a child by his mother.

Although petitioner complains that trial counsel failed to object to the imposition of a lifetime term of supervised release, he has failed to show any

prejudice. Prior to entering his guilty plea in this case, he pled guilty to child pornography charges in the Western District of Texas and received a sentence of 200 months to be followed by a lifetime term of supervised release for that offense. Thus, even if counsel should have objected to the imposition of this length of term of supervised release, he still faces a lifetime term as a result of his conviction in the Western District of Texas. Therefore, he cannot demonstrate any prejudice by trial counsel.

In addition, as noted above, Gagnon pled guilty to possessing large amounts of child pornography, much of which included “torture, humiliation, bondage, sadism, masochism, or a combination of those acts.” (Doc. no. 38 in *United States v. Gagnon*, Case No. 5:08-cr-00363-CLS-HGD, Plea Transcript, at 31). Further, during his plea proceedings, it was noted that Gagnon had admitted to engaging in sexual contact with a juvenile female. (*Id.* at 27). At his sentencing, the trial court stated that this conduct, together with the nature of the photographs that are described in petitioner’s change of plea hearing, caused the court to conclude that Gagnon was a “sexual predator.” (Doc. no. 39, in *United States v. Gagnon*, Case No. 5:08-cr-00363-CLS-HGD, Sentencing Transcript, at 50-51).

Under these circumstances, a reasonable attorney could have concluded that an objection to the term of supervised release was not warranted. In any event, had

such an objection been made, it is clear from the record that it would have been rejected. Thus, petitioner can demonstrate neither deficient performance nor prejudice in relation to his supervised release term.

Although petitioner states that trial counsel should have raised his abusive childhood as a reason for a downward departure in this case, trial counsel states that Gagnon only provided her with general information about his family background but that, when she sought more detail, he refused to discuss it. (Doc. no. 12 at Ex. A, Aff. of Katherine Luker, at 12). Although petitioner claims that Luker never asked him about his family history, a similar result occurred when the U.S. Probation Officer sought background information from petitioner for sentencing purposes. According to the Presentence Report, Gagnon "indicated that he and his sisters suffered from physical abuse by their parents" but declined to go into it, stating that it was a "private matter." (Doc. no. 21 in *United States v. Gagnon*, Case No. 5:08-cr-00363-CLS-HGD, Presentence Report, at 21). He also indicated that he and his sisters were sexually abused by his half-brother, but that he did not wish to discuss this either. (*Id.*). However, the probation officer did report that:

During an interview with the Vermont State Police, Gagnon reported that he and his sisters had been sexually abused as children by their older brother. According to the defendant's motion, [Gagnon's mother] observed her son Frederick (at age 18) in the process of sexually abusing her youngest daughter who was 2 ½ at the time. She said she made

Frederick leave her home. She said that she did not find out until years later that he had sexually abused Raymond and her other daughter, Lori.

Furthermore, at his sentencing hearing, petitioner advised that court that when he was young, he was molested by his brother, had been severely beaten, and that the beatings actually hurt him more than being molested. (Doc. no. 39 in *United States v. Gagnon*, Case No. 5:08-cr-00363-CLS-HGD, Sentencing Transcript, at 32).

Counsel cannot be ineffective for failing to provide information that petitioner failed to provide to her. *See Van Poyck v. Fla. Dep't of Corrs.*, 290 F.3d 1318, 1325 (11th Cir. 2002) (“Information supplied by a petitioner is extremely important in determining whether a lawyer’s performance is constitutionally adequate.” Because information about childhood abuse supplied by a defendant is “extremely important” in determining reasonable performance, “[w]hen a petitioner (or family members petitioner directs his lawyer to talk to) do not mention a history of physical abuse, a lawyer is not ineffective for failing to discover or to offer evidence of abuse as mitigation.”). *See also Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999) (“An attorney does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him.”). However, even if trial counsel failed to ask petitioner for this information, as he now claims, it was, in fact, made available to the court at the time of his sentencing, although

perhaps not in as great detail as petitioner would have liked. Thus, even assuming *arguendo* that Luker performed deficiently on all grounds asserted by Gagnon, Gagnon still has not satisfied his high burden of proving prejudice under the *Strickland* framework. Given the nature of the photographs noted above, the large number of photographs, the fact that the sentencing court believed petitioner was a sexual predator, and petitioner's admitted sexual abuse of a female juvenile in conjunction with another man who was subsequently charged with the murder of petitioner's ex-stepdaughter, it is highly improbable that information regarding petitioner's abusive childhood would have resulted in a downward departure. Therefore, this claim is without merit.

IV. CONCLUSION

Based on the foregoing analysis, it is RECOMMENDED that the Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 be DENIED.

NOTICE OF RIGHT TO OBJECT

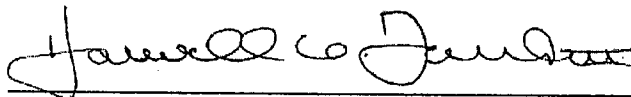
Any party who objects to this report and recommendation must, within fourteen (14) days of the date on which it is entered, file specific written objections with the clerk of this court. Any objections to the failure of the magistrate judge to address any contention raised in the complaint or petition also must be included. Failure to

do so will bar any later challenge or review of the factual findings or legal conclusions of the magistrate judge. See 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), *reh'g denied*, 474 U.S. 1111, 106 S.Ct. 899, 88 L.Ed.2d 933 (1986); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (*en banc*). In order to challenge the findings of the magistrate judge, a party must file with the clerk of the court written objections which shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. Objections not meeting this specificity requirement will not be considered by a district judge. IT IS NOT NECESSARY FOR PLAINTIFF OR PETITIONER TO REPEAT HIS LEGAL ARGUMENTS. AS TO THE FACTS, IF PLAINTIFF OR PETITIONER DOES RESPOND, HE SHOULD LIMIT HIMSELF TO ADDRESSING THE STATEMENTS OF FACT CONTAINED IN THE REPORT AND RECOMMENDATION TO WHICH HE OBJECTS. HE ALSO SHOULD OBJECT TO ANY FACTS NOT INCLUDED IN THE REPORT AND RECOMMENDATION WHICH HE CONTENDS SHOULD HAVE BEEN INCLUDED. THE FILING OF OBJECTIONS IS NOT A PROPER VEHICLE TO MAKE NEW ALLEGATIONS OR PRESENT ADDITIONAL EVIDENCE. A copy of the objections must be served upon all other parties to the action.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge shall make a *de novo* determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate judge. The district judge, however, need conduct a hearing only in his discretion or if required by law, and may consider the record developed before the magistrate judge, making his own determination on the basis of that record. The district judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

A party may ~~not~~ appeal a magistrate judge's recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a district judge.

DONE this 16th day of January, 2015.



HARWELL G. DAVIS, III
UNITED STATES MAGISTRATE JUDGE