IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 15-51249

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UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JAY EDWARD GLENEWINKEL, also known as Jay Glenewinkel, also known as Jay E. Glenewinkel,

Defendant - Appellant

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Appeals from the United States District Court for the
Western District of Texas, San Antonio

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Before HIGGINBOTHAM, DENNIS, and GRAVES, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motions for certificate of appealability, to amend 2255 motion and brief, and to proceed in forma pauperis. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is Denied.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-51249
USDC No. 5:15-CV-469
USDC No. 5:10-CR-216-1

A True Copy
Certified order issued Apr 17, 2017

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAY EDWARD GLENEWINKEL, also known as Jay Glenewinkel, also known as Jay E. Glenewinkel,

Defendant-Appellant

Appeal from the United States District Court for the
Western District of Texas, San Antonio

O R D E R:

Jay Edward Glenewinkel, federal prisoner # 56817-280, requests a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2255 motion challenging his guilty plea conviction and 210-month prison term for receiving child pornography. *See* 18 U.S.C. § 2252(a)(2). Glenewinkel will be granted a COA if he makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A COA will issue upon a showing that "reasonable jurists could debate whether (or, for that matter, agree that)" Glenewinkel's § 2255 motion "should have been resolved in a different manner or that the issues

APPENDIX C

presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (internal quotation marks and citation omitted).

Glenewinkel seeks a COA to pursue his claims that counsel was ineffective for failing to discuss supervised release with him before the plea was entered, counsel was ineffective for not filing a timely appellate brief, the district court did not comply with Federal Rule of Civil Procedure 11, the district court failed to explain its sentence adequately and failed to explain why it imposed supervised release for life, and the district court imposed a sentence based on miscalculations of the Sentencing Guidelines. Glenewinkel has not made the showing necessary to be granted a COA. *See Miller-El*, 537 U.S. at 336. Consequently, his motion for a COA is DENIED. Additionally, his motion to amend his § 2255 motion and brief is DENIED. *See United States ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 387 (5th Cir. 2003). Glenewinkel's motion to proceed in forma pauperis is DENIED also.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

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

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| JAY EDWARD GLENEWINKEL, | § | |
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| *Movant,* | § | |
| | § | |
| v. | § | Crim. Action No. SA-10-CR-216-XR |
| | § | Civil Action No. SA-15-CV-469-XR |
| UNITED STATES OF AMERICA | § | |
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| | § | |
| | § | |

**ORDER**

On this date the Court considered Movant's motion to vacate under 28 U.S.C. § 2255 (docket no. 103), the amended motion to vacate (docket no. 106), and the Magistrate Judge's Report and Recommendation (docket no. 114).

When a party objects to the Magistrate Judge's report and recommendation, the Court is required to conduct a *de novo* review. However, when no objections are filed, the Court reviews the recommendation to determine whether it is clearly erroneous. Movant has filed a document that he has titled Objections that states some objections but largely reiterates the claims he has asserted in his 28 U.S.C. § 2255 motions. The Court will nevertheless construe the document as objections to the entire Report and Recommendation and review this matter de novo.

The Magistrate Judge recommended that Glenewinkel's motions be denied. The Court has reviewed the Report and Recommendation, Movant's objections and conducted a de novo



APPENDIX A

review. The Court ACCEPTS the Magistrate Judge's recommendations and DENIES Movant's 2255 motions.

**Background**

On March 17, 2010, the Defendant was charged in an indictment with receipt of child pornography and possession of child pornography. After numerous continuances were requested by the Defendant (and granted by the Court) and after the Defendant sought new counsel (and was granted substitution of counsel), the Defendant signed a plea agreement on July 14, 2011. In the written plea he signed that he understood he was pleading guilty to receipt of child pornography and that he could be sentenced to 20 years and a lifetime of supervised release. He read and agreed to a factual basis for plea; he agreed that he voluntarily and knowingly waived the right to appeal his sentence and agreed that he had sufficient time to consult with his counsel and that he had received effective assistance of counsel. He read and understood that the Government agreed to dismiss count two at time of sentencing. Docket no. 46. On August 4, the Court accepted the plea agreement after admonishing the Defendant. Docket no. 47.

On December 14, 2011, a sentencing hearing was held. Defendant was sentenced to 210 months (17.5 years) and lifetime supervised release. The Fifth Circuit dismissed his appeal and the Supreme Court denied certiorari.

**Objections to the Report and Recommendations**

In his Objections Movant asserts that his counsel failed to adequately discuss with him "issues related to supervised release" prior to his signing the plea agreement. He also alleges that his counsel failed to perfect and file a direct appeal timely. He also alleges the Court erred (apparently in the plea hearing) by failing to explain to him the nature of the charges, and that the Court erred by failing to adequately explain the imposition of a term of 210 months and the imposition of lifetime supervised release. He also alleges that the Court erred by "imposing a sentence based on a lack of evidence to support Sentencing Guidelines enhancements and miscalculation of the same Guidelines."

**Analysis**

Movant acknowledges that a § 2255 movant cannot seek to raise issues that could have been raised in a direct appeal. *See* Report and Recommendation at pp. 15-16. Movant's objections regarding the procedural bar are frivolous. Likewise, his objections regarding his waiver of right to appeal are frivolous. *See* Report and Recommendation at pp. 16-19.

With regard to his claim that he did not fully understand what supervised release meant, Movant acknowledges that he informed the Court at his plea hearing that he knew what the term meant. Movant does not state in his objections what specific terms of supervised release he now finds objectionable.

Movant claims that his counsel was ineffective because he untimely filed his brief with the circuit court. The Fifth Circuit docket sheet indicates, however, that the untimely brief was accepted out of time. See 5th Circuit docket entry dated November 13, 2013. On January 2, 2014, the Government filed a motion to dismiss the appeal because of the appeal waiver provision in the plea agreement, and that motion was granted on February 11, 2014. See 5th Circuit docket entry dated February 11, 2014. Accordingly, Movant fails to show how any late filing caused any prejudice.

Movant argues that the court during his plea hearing failed to detail all the elements of the charge of receipt of child pornography. This claim is frivolous. Defendant was questioned during the plea hearing as to whether he read and understood the factual basis for plea contained in the agreement prior to his signing of the agreement. The factual basis clearly states that on July 16, 2009, law enforcement officers seized a computer and 73 compact disks from the Defendant's residence. A forensic examination revealed that 611 videos and 1,352 images of child pornography were found. Movant admitted that he had purchased the child pornography videos from a person located in Italy, who sent him the materials from February 2006 through July 2007. Movant's argument that he lacked a "solid understanding" of the legal term receipt as that term is "esoteric" to him is baseless.

As indicated above, Movant's challenge to his sentence is procedurally barred and barred by the waiver provision. Alternatively, as Movant acknowledges the Court at sentencing took in account the 3553 factors, reviewed the Presentence Investigation Report, which outlined abuse of prepubescent minors and material portraying sadistic or masochistic conduct, and numerous images. The Guideline range was 210 to 240 months, and the statutory maximum was 20 years. Considering all of the above, the Court stated that a sentence at the low end of the sentencing guideline range was appropriate. Other than his general complaint of supervised release, Movant fails to identify what specific conditions he objects to. With regard to his general complaint that lifetime supervised release was imposed, Movant fails to specify given his conduct why a lesser term was appropriate. If Movant successfully complies with the terms of his supervised release, he retains the right to petition the Court for a modification of the terms or length of his supervised release. Movant's objections are frivolous.

Finally, Movant complains that a five-level enhancement was inappropriately calculated into his sentencing range. Again, this complaint is barred by the waiver of appeal provision. In any event, Movant's objection is frivolous, the enhancement was applied because the offense involved the distribution for the receipt, or expectation of receipt, of a thing of value pursuant to USSG § 2G2.2(b)(2). This case was not the typical peer to peer file-sharing case. *See e.g. U.S. v. Baker*, 742 F. 3d 618 (5th Cir. 2014) (defendant allegedly did not know that his use of file-sharing program permitted other users to download child pornography from his computer did not preclude application of sentencing enhancement for distribution of child pornography). In this case the Defendant was visiting known child pornography web sites and posting images on those sites and then also downloading onto his computer images that others had posted on those sites. Accordingly, despite the absence of file sharing programs the enhancement is still applicable. *See e.g. U.S. v. Oldham*, 177 F. App'x 842 (10th Cir. 2006)("We agree that a defendant may be considered to have an "expectation" that he will receive child pornography in exchange for his distribution of child pornography, even in the absence of a specific agreement with another person, if he anticipates or reasonably believes that the recipients of his distribution will reciprocate."). Special Agent DePaola testified at the sentencing hearing that the Defendant accessed the Italian website and shared images with that website. Special Agent DePaola testified that the Defendant admitted to sharing child pornography. *See* docket no. 71, Transcript of Sentencing Hearing. Indeed, AOL shut down the Defendant's account after it became aware that the Defendant had uploaded a video containing child pornography. Because of his exchange with the Italian web site Defendant had an expectation that he would receive child pornography in exchange for the posting he made. Defendant's hearsay objections to Special Agent DePaola's testimony lack merit. *See U.S. v. Gonzalez*, 661 F. 2d 488 (5th Cir. 1981)("The sentencing judge may consider evidence which may not be admissible at trial.").

Finally, with regard to the Movant's general attack on the Guidelines governing child pornography crimes, the Fifth Circuit has rejected such arguments. *See U.S. v. Teuschler*, 689 F. 2d 397, 400 (5th Cir. 2012)("This court has expressly rejected the suggestion that the Guidelines are unreasonable or irrational simply because they are not based on empirical data, even where this leads to apparent disparities in sentences.").

**COA**

A habeas petitioner must obtain a Certificate of Appealability (COA) before he may appeal from a district court's denial of his petition. See 28 U.S.C. § 2253(c)(1). When a district court denies relief on the merits of a claim, the petitioner must "demonstrate that reasonable jurists would find the ... court's assessment of the [claim] debatable or wrong." Coleman v. Thaler, 716 F. 3d 895 (5th Cir. 2013). A COA is only warranted if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, the petitioner must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Byrom v. Epps, 518 F. App'x 243 (5th Cir. 2013). Glenewinkel has not made the necessary showing. A Certificate of Appealability is denied.

**Conclusion**

Movant's motion to vacate under 28 U.S.C. § 2255 (docket no. 103) and the amended motion to vacate (docket no. 106) are denied. A Certificate of Appealability is denied.

SIGNED this 10th day of December, 2015.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

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|---|---|
| **JAY EDWARD GLENEWINKEL,**<br><br>**Movant-Defendant,**<br><br>**v.**<br><br>**UNITED STATES OF AMERICA,**<br><br>**Respondent-Plaintiff.** | **CIVIL NO. SA-15-CA-469-XR**<br>**(SA-10-CR-216-1-XR)** |

**REPORT AND RECOMMENDATION**
**OF UNITED STATES MAGISTRATE JUDGE**

**TO: Honorable Xavier Rodriguez**
**United States District Judge**

Pursuant to an informal referral of the above-styled and numbered cause to the undersigned United States Magistrate Judge, and consistent with the authority vested in United States Magistrate Judges under the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 1(d) and (e) of the Local Rules for the Assignment of Duties to United States Magistrate Judges, Appendix C to the Local Rules for the Western District of Texas, the following report is submitted for your review and consideration.

## I. JURISDICTION

Jurisdiction is noted pursuant to 28 U.S.C. § 2255.

## II. SUMMARY OF PROCEDURAL HISTORY

Defendant was arrested following his grand jury indictment with receipt and possession of child pornography. At his initial appearance, the Court appointed an attorney for defendant and, with the concurrence of the Government, set bond conditions. Later, defendant's bond was revoked. Thereafter, defendant, through counsel made six motions (one of which was oral) to continue the scheduling order deadlines, each of which was granted. Five of the motions were filed by defendant's first appointed counsel; the last motion was filed by defendant's second appointed counsel. More specifically regarding counsel, on March 1, 2011, defendant asked for a new attorney and, following a hearing, the Court granted defendant's request for a new attorney.

On July 27, 2011, a plea agreement was filed in which defendant agreed to plead guilty to receiving child pornography. The written plea agreement included information on defendant's maximum possible sentence under the statute (including that he faced a lifetime supervised release term), a waiver of appellate and post-conviction rights, an acknowledgment by defendant he received effective assistance of counsel, and an agreed factual basis in support of the plea. On August 4, 2011, defendant pleaded guilty before Judge Rodriguez. On December 14, 2011, defendant was sentenced to 210 months imprisonment, lifetime supervised release, and payment of the $100 mandatory assessment. An initial judgment and commitment order was filed on December 22, 2011, and, after the Court entered an order on restitution, an amended judgment and commitment order was filed on June 6, 2013. In the meantime, on January 5, 2012, defendant filed a notice of direct appeal. On February 11, 2014, the United States Court of Appeals for the Fifth Circuit granted the Government's motion to dismiss defendant's direct appeal because it was barred by the waiver provisions in his plea agreement. Through new appointed counsel, defendant filed a petition for writ of certiorari which was denied on June 23, 2014.

On June 4, 2015, defendant filed his pro se motion to file an over-size motion to vacate, tendering his lengthy section 2255 motion with a separate lengthy brief in support. The Court denied plaintiff's leave to file the lengthy documents and ordered defendant to file an amended motion. On July 13, 2015, defendant filed an amended motion and brief in support. The amended motion states defendant raises "six (6) claims in violation of his right to Due Process under the Sixth Amendment" with "three (3) grounds for Ineffective Assistance of Counsel" and "three (3) claims of Procedural Error." The Court directed service on the Government and on September 10, 2015, the Government filed its response. Defendant asked for more time to reply, a request that was granted in part, but defendant was required to file an reply on or before October 22, 2015, and as of the time of tendering this report to the District Clerk's Office for filing, no reply brief was filed.

## III. ISSUE

Whether defendant's § 2255 motion should be granted or denied?

## IV. STANDARDS

### A. Scope of Review

Section 2255 of Title 28, United States Code, provides relief for a convicted federal criminal defendant who can establish that either: (1) his sentence was imposed in violation of the Constitution or laws of the United States, (2) the sentencing court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack.[1] Thus, § 2255 post-conviction relief is reserved for errors of constitutional dimension and other injuries that could not have been raised on direct

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[1] 28 U.S.C. § 2255; United States v. Placente, 81 F.3d 555, 558 (5th Cir. 1996); United States v. Seyfert, 67 F.3d 544, 546 (5th Cir. 1995); Beauford v. United States, No. SA-04-CA-0213-RF, 2005 WL 1459449, at *2 (W.D. Tex. Jun. 9, 2005).

appeal and, if left unaddressed, would result in a complete miscarriage of justice.[2]

"Nonconstitutional claims that could have been raised in a direct appeal, but were not, may not be asserted in a collateral proceeding,"[3] such as a § 2255 petition. Relief under § 2255 is limited to constitutional or jurisdictional errors.[4] Further, § 2255 does not reach errors not of a constitutional or jurisdictional magnitude that could have been reached by a direct appeal.[5] Stated another way, a collateral challenge may not substitute for an appeal.[6] Except for ineffective assistance of counsel claims,[7] a defendant may not raise an issue, regardless of whether constitutional or jurisdictional in nature, for the first time on collateral review without showing both "cause" and "actual prejudice" resulting from the error.[8]

"For a collateral attack under § 2255, 'a distinction is drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other.'"[9] "A defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional

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[2] See, e.g., United States v. Cervantes, 132 F.3d 1106, 1109 (5th Cir. 1998); United States v. Payne, 99 F.3d 1273, 1281 (5th Cir. 1996).

[3] Payne, 99 F.3d at 1281.

[4] Manley v. United States, 352 F.2d 515, 515 (5th Cir. 1965).

[5] See e.g., United States v. Rocha, 109 F.3d 225, 229 (5th Cir. 1997); United States v. Shaid, 937 F.2d 228, 231-32 (5th Cir. 1991), cert. denied, 502 U.S. 1076, 112 S. Ct. 978 (1992).

[6] Shaid, 937 F.2d at 231; Castanon v. United States, No. EP-05-CA-178-DB, 2005 WL 1958369, at *3 (W.D. Tex. Aug. 9, 2005).

[7] Massaro v. United States, 538 U.S. 500, 123 S. Ct. 1690 (2003).

[8] United States v. Patten, 40 F.3d 774, 776 (5th Cir.), cert. denied, 515 U.S. 1132, 115 S. Ct. 2558 (1995).

[9] United States v. Pierce, 959 F.2d 1297, 1300-01 (5th Cir.) (citation omitted), cert. denied, 506 U.S. 1007, 113 S. Ct. 621 (1992).

magnitude, and may not raise an issue for the first time on collateral review without showing both 'cause' for his procedural default, and 'actual prejudice' resulting from the error."[10] Other types of error may not be raised in a collateral attack, unless the defendant demonstrates that the error could not have been raised on direct appeal, and if condoned would result in a complete miscarriage of justice.[11]

**B. Procedural Bar**

"It is well settled that where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in a § 2255 motion only if the petitioner can first demonstrate either (1) 'cause' and 'prejudice,' or (2) that he is 'actually innocent' of the crime for which he was convicted."[12] Ineffective assistance of counsel claims ordinarily satisfy the "cause and prejudice" standard. "[I]neffective assistance of counsel, if proven, is sufficient to establish the cause and prejudice necessary to overcome a procedural default."[13]

**C. Waiver**

The Fifth Circuit Court of Appeals has upheld waivers of the right to appeal and to seek post-conviction relief.[14] Other circuits also have upheld waivers of appeal.[15] Further, the United

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[10] Id. at 1301 (citation omitted).

[11] Patten, 40 F.3d at 776; Pierce, 959 F.2d at 1301 (citation omitted).

[12] United States v. Torres, 163 F.3d 909, 911 (5th Cir. 1999) (citing United States v. Sorrells, 145 F.3d 744, 749 (5th Cir. 1998)); United States v. Mackey, 299 F. Supp. 2d 636, 639-640 (E.D. La. 2004).

[13] United States v. Teshima-Jiminez, No. CRIM. 97-087, 1999 WL 600326, at *3 (E.D. La. Aug. 5, 1999) (citing United States v. Acklen, 47 F.3d 739, 741 (5th Cir. 1995)).

[14] United States v. Dees, 125 F.3d 261, 269 (5th Cir. 1997), cert. denied, 522 U.S. 1152, 118 S. Ct. 1174 (1998) ("So long as a plea is informed and voluntary, we will enforce a waiver of

States Supreme Court has held that the right to file an appeal is a statutory right and not a constitutional right.[16] It follows that the right to collaterally attack one's sentence by a § 2255 motion is also a statutory and not a constitutional right.[17] The Supreme Court has held repeatedly that a defendant may waive his or her constitutional rights as part of a plea bargain.[18] Accordingly, a defendant also may waive his or her right to file a post-conviction attack.

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appeal. United States v. Melancon, 972 F.2d 566 (5th Cir. 1992)."); United States v. Abreo, 30 F.3d 29, 32 & n.5 (5th Cir. 1994), cert. denied, 513 U.S. 1064, 115 S. Ct. 681 (1994).

[15] United States v. Salcido-Contreras, 990 F.2d 51, 53 (2d Cir.) ("In no circumstance, however, may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless."), cert. denied, 509 U.S. 931, 113 S. Ct. 3060 (1993); United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir.) ("Like the right to bring a direct appeal of his sentence, the right Abarca seeks to exercise in bringing a collateral attack is statutory. A knowing and voluntary waiver of a statutory right is enforceable. While we do not hold that Abarca's waiver categorically forecloses him from bringing any section 2255 proceeding, such as a claim of ineffective assistance of counsel or involuntariness of waiver, the question of the degree of his culpability is an issue clearly contemplated by, and subject to, his plea agreement waiver.") (citations omitted), cert. denied, 508 U.S. 979, 113 S. Ct. 2980 (1993); United States v. Rutan, 956 F.2d 827, 829 (8th Cir. 1992) ("The chief virtues of plea agreements are speed, economy, and finality. Waivers of appeal in plea agreements preserve the finality of judgments and sentences imposed pursuant to valid pleas of guilty. We also note that plea agreements are of value to the accused in order to gain concessions from the government.") (citations omitted) (as quoted in United States v. Andis, 333 F.3d 886, 889 (8th Cir.), cert. denied, 540 U.S. 997, 124 S. Ct. 501 (2003)); United States v. Wiggins, 905 F.2d 51, 53-54 (4th Cir. 1990) ("As this court has recognized, '[i]f defendants can waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial, surely they are not precluded from waiving procedural rights granted by statute.' . . . Accordingly, we hold that a defendant who pleads guilty, and expressly waives the statutory right to raise objections to a sentence, may not then seek to appeal the very sentence which itself was part of the agreement.") (citations omitted).

[16] Abney v. United States, 431 U.S. 651, 655, 97 S. Ct. 2034, 2038 (1997).

[17] Id.

[18] Town of Newton v. Rumery, 480 U.S. 386, 392, 107 S. Ct. 1187, 1192 (1987).

In United States v. Wilkes, the Fifth Circuit affirmed the trial judge's decision that the defendant effectively waived his right to post-conviction relief as part of a plea bargain when the plea hearing colloquy showed the defendant understood the consequences of his actions.[19] The Court noted that sworn declarations at the rearraignment are "given a strong presumption of verity."[20] The Court upheld the specific language of the plea bargain in which the defendant waived not only the right of direct appeal—unless the defendant was sentenced based on an upward departure—but also the right to a post-conviction review stating, "we see no principled means of distinguishing such waiver [of post-conviction review] from the waiver of a right to appeal."[21]

The Fifth Circuit has identified limited situations where a waiver will not be enforced. A movant may bring an ineffective assistance of counsel claim, despite a waiver, if the claim "directly relates to the voluntariness of the waiver."[22] In other words, an ineffective assistance of counsel claim may stand only if the defendant alleges the ineffective assistance caused the plea agreement or waiver to be unknowing or involuntary. In United States v. White, the Fifth Circuit set out two questions, both which must be answered affirmatively, to determine if a claim invalidates a waiver: (1) was "the plea or waiver itself [made] knowing and voluntary; and (2) is

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[19] 20 F.3d 651, 653 (5th Cir. 1994).

[20] Id.

[21] Id. See United States v. Portillo, 18 F.3d 290, 291 (5th Cir.), cert. denied, 513 U.S. 893, 115 S. Ct. 244 (1994).

[22] United States v. White, 307 F.3d 336, 337, 339 (5th Cir. 2002).

the issue being challenged a proper subject of the waiver."[23]

**D. Ineffective Assistance of Counsel**

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in Strickland v. Washington:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[24]

The benchmark for judging any claim of ineffective assistance is whether counsel's performance was so deficient that it undermined the proper functioning of the adversarial process such that the trial cannot be relied upon as having produced a just result.[25]

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. First, movant must show that counsel's performance was deficient. Second, movant must show that the deficient performance prejudiced movant's defense. Unless movant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.[26]

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[23] Id. at 343-44.

[24] 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

[25] Id. at 686, 104 S. Ct. at 2063-64.

[26] Id. at 687, 104 S. Ct. at 2063-64.

The proper standard for attorney performance is that of reasonably effective assistance. When a convicted defendant complains of the ineffectiveness of counsel's assistance, movant must show, considering all the circumstances, that counsel's representation fell below an objective standard of reasonableness. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.[27] The courts are deferential in scrutinizing the performance of counsel.[28] A reviewing court should indulge a strong presumption that counsel's performance falls within the wide range of reasonably prudent professional assistance.[29] An attorney's strategic choices, usually based on information supplied by defendant and from a thorough examination of relevant facts and law, are virtually unchallengeable.[30] Counsel is required neither to advance every non-frivolous argument nor to investigate every conceivable matter, inquiry into which could be

[27] Id. at 687-89, 104 S. Ct. at 2064-65.

[28] See United States v. Drones, 218 F.3d 496, 500-04 (5th Cir. 2000) (trial counsel's failure to explore possibility of spectrographic analysis of voice on tape recording was objectively reasonable when there was legitimate debate about admissibility of testimony regarding same), cert. denied, 531 U.S. 1151, 121 S. Ct. 1095 (2001); Williams v. Cain, 125 F.3d 269, 276 (5th Cir. 1997) (review of first prong of Strickland requires consideration of facts and resources available to defense counsel at time of trial), cert. denied, 525 U.S. 859, 119 S. Ct. 144 (1998).

[29] Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. But see Missouri v. Frye, __ U.S. __, 132 S. Ct. 1399 (2012) (counsel was deficient in failing to communicate to defendant prosecutor's written plea offer before it expired).

[30] Jones v. Jones, 163 F.3d 285, 300 (5th Cir. 1998), cert. denied, 528 U.S. 895, 120 S. Ct. 224 (1999).

classified as non-frivolous.[31] In fact, "[a] conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness."[32] A criminal defense counsel is not required to exercise clairvoyance during the course of a criminal trial.[33] Likewise, the Sixth Amendment does not require counsel to do the impossible or unethical; if there is no bona fide defense to the charge, counsel is not required to create one.[34]

The proper standard for evaluating counsel's performance under the Sixth Amendment is "reasonably effective assistance."[35] "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on

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[31] See Neal v. Cain, 141 F.3d 207, 214-15 (5th Cir. 1998) (petitioner's complaints regarding counsel's failure to raise specific defenses did not satisfy prejudice prong of Strickland when proposed defenses were without merit); Sones v. Hargett, 61 F.3d 410, 415 n.5 (5th Cir. 1995) (counsel not deficient for failing to pursue frivolous point); United States v. Gibson, 55 F.3d 173, 179 (5th Cir. 1995) (Sixth Amendment does not require counsel to file meritless motions); Smith v. Collins, 977 F.2d 951, 960 (5th Cir. 1992) ("The defense of a criminal case is not an undertaking in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited time and resources."), cert. denied, 510 U.S. 829, 114 S. Ct. 97 (1993); Koch v. Puckett, 907 F.2d 524, 527 (5th Cir. 1990) (counsel not required to make futile motions or objections); Schwander v. Blackburn, 750 F.2d 494, 500 (5th Cir. 1985) (counsel not required to investigate everyone whose name is mentioned by defendant).

[32] United States v. Holmes, 406 F.3d 337, 360 n.36 (5th Cir.) (quoting United States v. Jones, 287 F.3d 325, 331 (5th Cir. 2003)), cert. denied, 546 U.S. 871, 126 S. Ct. 375 (2005); Green v. Johnson, 116 F.3d 1115, 1122 (5th Cir. 1997).

[33] See Sharp v. Johnson, 107 F.3d 282, 290 n.28 (5th Cir. 1997). See also Lackey v. Johnson, 116 F.3d 149, 152 (5th Cir. 1997) (trial counsel not ineffective for failing to discover evidence defendant knew about but withheld from counsel).

[34] See United States v. Cronic, 466 U.S. 648, 656 n.19, 104 S. Ct. 2039, 2045 n.19 (1984).

[35] Strickland, 466 U.S. at 687, 104 S. Ct. at 2063-64; Bullock v. Whitley, 53 F.3d 697, 700 (5th Cir. 1995).

the judgment."[36] "Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[37] In order to establish that he has sustained prejudice, the convicted defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[38] The prejudice prong of Strickland focuses on whether counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair; unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.[39] To establish prejudice as a result of an alleged error at sentencing, a § 2255 movant must show there is a reasonable probability that, but for counsel's alleged error, the sentencing would have been different.[40] This requires him to show "there was a reasonable probability that, but for [counsel's deficient performance], [the defendant] would have received a lesser sentence than he did."[41]

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[36] Strickland, 466 U.S. at 691, 104 S.Ct. at 2066-67.

[37] Id. at 692, 104 S.Ct. at 2067.

[38] Id. at 694, 104 S.Ct. at 2068.

[39] Id. at 692, 104 S.Ct. at 2067. See Lafler v. Cooper, __ U.S. __, 132 S. Ct. 1376 (2012) (defendant was prejudiced by counsel's deficient performance in advising defendant to reject plea offer and go to trial).

[40] See United States v. Phillips, 210 F.3d 345, 350 (5th Cir. 2000).

[41] United States v. Grammas, 376 F.3d 433, 437-38 (5th Cir. 2004) ("We hold that Glover [v. United States, 531 U.S. 198, 121 S. Ct. 696 (2001)] abrogates the significantly less harsh test, and that any additional time in prison has constitutional significance.") (additional citations omitted). See United States v. Moody, 622 F. Supp. 2d 362, 372 (E.D. La. 2009) ("In cases involving counsel's performance at the sentencing stage, the Supreme Court and the Fifth Circuit

The two-part Strickland test also applies to the performance of counsel on appeal.[42] There are two types of claims involving denial of assistance of appellate counsel. First, when a defendant is either actually or constructively denied the assistance of counsel on appeal, prejudice is presumed.[43] Second, a petitioner who argues her counsel failed to assert or fully brief a particular claim must show that her attorney's performance was both deficient and prejudicial.[44] When a defendant's appellate counsel presented, briefed, and argued, albeit unsuccessfully, one or more non-frivolous grounds for relief on appeal, defendant was neither actually nor constructively denied assistance of counsel on direct appeal.[45]

In the context of evaluating the prejudice prong of Strickland as applied to a claim of ineffective assistance on appeal, the fairness and reliability of the appeal are necessarily functions

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have emphasized that Strickland prejudice exists whenever there is a reasonable probability that, but for counsel's errors, the defendant's term of actual imprisonment would have differed in 'any amount.' [United States v.] Conley, 349 F.3d [837,] 842 [(5th Cir. 2003)] (quoting Glover v. United States, 531 U.S. 198, 203, 121 S. Ct. 696, 148 L. Ed. 604 (2001)).").

[42] Phillips, 210 F.3d at 348-50; Sharp v. Puckett, 930 F.2d 450, 451 (5th Cir. 1991).

[43] Penson v. Ohio, 488 U.S. 75, 86-89, 109 S. Ct. 346, 353-54 (1988) (prejudice prong of Strickland test does not apply in cases where appellate counsel withdraws without first filing an Anders brief); Hughes v. Booker, 220 F.3d 346, 349 (5th Cir. 2000); White v. Johnson, 180 F.3d 648, 650 (5th Cir. 1999) (defendant who was denied right to appeal because counsel failed to advise him of right to appeal, procedure and time limits involved, and right to appointed counsel on appeal, need not show prejudice); Jackson v. Johnson, 150 F.3d 520, 524-25 (5th Cir. 1998) (constructive denial of counsel on appeal occurs only when counsel's ineffectiveness is so egregious as to effectively deny defendant any meaningful assistance at all), cert. denied, 526 U.S. 1041, 119 S. Ct. 1339 (1999); United States v. Riascos, 76 F.3d 93, 94 (5th Cir. 1996) (complete denial of counsel on appeal, whether actual or constructive, creates presumption of prejudice).

[44] Hughes, 220 F.3d at 349; Jackson, 150 F.3d at 525.

[45] Jackson, 150 F.3d at 525.

of the fairness and reliability of the trial.[46] Satisfying the prejudice prong of Strickland in connection with a claim of ineffective assistance by appellate counsel requires more than a mere complaint about deficiencies in an appellate brief.[47] Appellate counsel are not required to present patently frivolous arguments on appeal, or even to present all non-frivolous points that could have been raised.[48] "The Constitution does not require appellate counsel to raise every non-frivolous ground that might be pressed on appeal."[49] Appellate counsel is not ineffective solely because of failure to present every ground urged by the defendant.[50] To prevail on a claim of ineffective assistance by appellate counsel, a petitioner must identify with specificity all grounds

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[46] Mayabb v. Johnson, 168 F.3d 863, 869 (5th Cir. 1998) ("When we do not find prejudice from the trial error, by extension, we cannot find prejudice from an appellate error predicated on the same issue."), cert. denied, 528 U.S. 969, 120 S. Ct. 409 (1999); Jackson, 150 F.3d at 525-26 ("focus on mere outcome determination at the appellate level is defective" and "[t]he presence or absence of prejudice . . . hinges upon the fairness of the trial and the reliability of the judgment of conviction").

[47] Moawad v. Anderson, 143 F.3d 942, 946-47 (5th Cir.) (claim of ineffective assistance on appeal fails if claim arose from alleged error at trial that did not itself prejudice defendant), cert. denied, 525 U.S. 952, 119 S. Ct. 383 (1998).

[48] Phillips, 210 F.3d at 348 (appellate counsel not required to raise every non-frivolous issue, but solid meritorious arguments based on directly controlling precedent should be discovered and brought to court's attention); United States v. Williamson, 183 F.3d 458, 462 (5th Cir. 1999); Williams v. Collins, 16 F.3d 626, 635 (5th Cir.) (federal habeas petitioner's claim of ineffective assistance by appellate counsel failed to satisfy prejudice prong of Strickland when all omitted grounds for relief on appeal raised by petitioner were without merit), cert. denied sub nom., Williams v. Scott, 512 U.S. 1289, 115 S. Ct. 42 (1994).

[49] Ellis v. Lynaugh, 873 F.2d 830, 840 (5th Cir.), cert. denied, 493 U.S. 970, 110 S. Ct. 419 (1989).

[50] Id.; Flores v. Johnson, 957 F. Supp. 893, 924 (W.D. Tex. 1997).

for relief that he claims should have been included in his appellate brief.[51]

Because a convicted defendant must satisfy both prongs of the Strickland test, a failure to establish either deficient performance or prejudice under that test makes it unnecessary to examine the other prong.[52] Therefore, a failure to establish that counsel's performance fell below an objective standard of reasonableness avoids the need to consider the issue of prejudice.[53] It is also unnecessary to consider whether counsel's performance was deficient when there is an insufficient showing of prejudice.[54]

A movant in a collateral attack has the burden to allege and prove facts which would entitle him to relief.[55] "Presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."[56]

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[51] Russell v. Lynaugh, 892 F.2d 1205, 1213 (5th Cir. 1989) (generalized complaints about quality of appellate brief do not satisfy prejudice prong of Strickland test), cert. denied sub nom., Russell v. Collins, 501 U.S. 1259, 111 S. Ct. 2909 (1991).

[52] Strickland, 466 U.S. at 700, 103 S.Ct. at 2071; United States v. Seyfert, 67 F.3d 544, 547 (5th Cir. 1995).

[53] United States v. Hoskins, 910 F.2d 309, 311 (5th Cir. 1990); Thomas v. Lynaugh, 812 F.2d 225, 229-30 (5th Cir.), cert. denied, 484 U.S. 842, 108 S. Ct. 132 (1987).

[54] Bates v. Blackburn, 805 F.2d 569, 578 (5th Cir. 1986), cert. denied, 482 U.S. 916, 107 S. Ct. 3190 (1987).

[55] Estep v. United States, 251 F. 2d 579 (5th Cir. 1958).

[56] Blackledge v. Allison, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629 (1977) (citations omitted). See Miller v. Johnson, 200 F.3d 274, 281 (5th Cir.) ("This Court has made clear that conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding. In the absence of a specific showing of a failure to investigate or prepare a defense were constitutionally deficient errors and omissions, and how they prejudiced his right to a fair trial, we [can find] no merit to these [claims]."), cert. denied, 531 U.S. 849, 121 S. Ct. 122 (2000); Knighton v. Maggio, 740 F.2d 1344, 1349 (5th Cir.) ("One claiming ineffective assistance of counsel must identify specific acts or omissions; general statements and

## V. DISCUSSION

Defendant's amended motion and brief in support lists six grounds for relief. He identifies the first three grounds as claims of ineffective assistance of counsel:

1. Failure to investigate and mitigate facts in his background history;
2. Failure to advise Glenewinkel about supervised release, at any time during the legal process; and
3. Failure to perfect a direct appeal.

Additionally, defendant's motion lists three more grounds of "Procedural Error" in the trial court:

1. Failure to explain the nature of the charges and applicable law pursuant to Federal Rule of Criminal Procedure 11;
2. Failure to adequately explain the reasons for (a) imposing his term of imprisonment, and (b) imposing his term of supervised release, during sentencing; and
3. Error in accepting the Pre-Sentence Report's guideline calculation to enhance by a five point increase, pursuant to the Sentencing Guidelines' Special Offense Characteristics.

### A. Procedural Bar

It is well-settled that a § 2255 movant cannot relitigate issues raised and decided on direct appeal.[57] "[I]ssues raised and disposed of in a previous appeal from an original judgment of

conclusionary charges will not suffice. The particular professional failure must be pled and proven."), cert. denied sub nom., Knighton v. Louisiana, 469 U.S. 924, 105 S. Ct. 306 (1984); Ross v. Estelle, 694 F.2d 1008, 1012 (5th Cir. 1983) ("Mere conclusory allegations do not raise a constitutional issue in a habeas proceeding.").

[57] Ceballos Torres v. United States, 83 Fed. App'x 609 (5th Cir. Dec. 10, 2003); United States v. Rocha, 109 F.3d 225, 229 (5th Cir. 1997) (citing United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 118, 106 S. Ct. 1977 (1986)).

conviction are not considered in § 2255 [m]otions."[58] Except for ineffective assistance of counsel claims, a defendant also cannot seek to raise in a § 2255 proceeding issues that could have been raised in a direct appeal (including constitutional and jurisdictional claims) unless the defendant can show cause and actual prejudice or actual innocence. The "three (3) claims of procedural error" defendant lists in his § 2255 motion are procedurally barred because defendant has not shown that he did not raise, or could not have raised, the challenges to his conviction and sentence in a direct appeal and has not shown "just cause for the default." Defendant cannot rely on an ineffective assistance claim to satisfy the "cause" requirement.[59] Defendant also has not demonstrated cause, prejudice, actual innocence or manifest injustice. Defendant does not specify how the Court erred or demonstrate the Court committed any error of law.

Moreover, defendant's objections do not raise constitutional or jurisdictional issues cognizable under § 2255, even if not procedurally barred. Therefore, even if not waived (as discussed below), each of defendant's three grounds for § 2255 relief identified as "Procedural Error"—except his three claims of ineffective assistance of counsel—are procedurally barred and not cognizable under § 2255. On the other hand, even if not waived, defendant's claim of ineffective assistance of counsel is not procedurally barred and is fully considered by the Court. Further, to the extent the procedurally barred issues and arguments arguably support defendant's assertion of ineffective counsel, the arguments have been fully so considered in connection with

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[58] Kalish, 780 F.2d at 508 (citing United States v. Jones, 614 F.2d 80, 82 (5th Cir.), cert. denied, 446 U.S. 945, 100 S. Ct. 2174 (1980)).

[59] United States v. Rusmisel, 716 F.2d 301, 303-04 & n.5 (5th Cir. 1983); Washington v. Estelle, 648 F.2d 276, 278 (5th Cir.), cert. denied, 454 U.S. 899, 102 S. Ct. 402 (1981); Lumpkin v. Ricketts, 551 F.2d 680 (5th Cir.), cert. denied, 434 U.S. 957 (1977);

the recommendations made in this report (although they are not discussed in this report).[60]

**B. Waiver**

As part of his plea agreement, defendant knowingly and voluntarily waived his right to appeal his conviction and sentence. The Fifth Circuit Court of Appeals has upheld waivers of the right to appeal and to seek post-conviction relief.[61] Other Circuits also have upheld waivers of appeal.[62] Further, the United States Supreme Court has held that the right to file an appeal is a

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[60] In brief, the record shows the written plea agreement, the rearraignment hearing, the PSR, and the sentencing hearing clearly informed defendant, repeatedly, of the nature of the charge. Specifically, even if not procedurally barred, defendant's conclusory challenge that the Court did not explain the nature of the charge is without merit. Defendant's argument that the Court did not explain the reasons for imposing a 210-month term of imprisonment and lifetime supervised release term, even if not procedurally barred, are without merit as defendant has not demonstrated a Rule 32 violation. Finally, defendant's argument that the evidence does not support the five point enhancement for distribution of child pornography, even if not procedurally barred, is not cognizable in this proceeding. See United States v. Segler, 37 F.3d 1131, 1134 (5th Cir. 1994) (challenge to calculation of advisory guidelines is not a constitutional issue within the scope of § 2255). Even if not barred and cognizable, the Court heard the testimony of Agent DePaola on whether defendant's conduct constituted distribution for the receipt, or expectation of receipt, of a thing of value. The Court found the enhancement applied and defendant has not demonstrated that decision was in error.

[61] United States v. Dees, 125 F.3d 261, 269 (5th Cir. 1997), cert. denied, 522 U.S. 1152, 118 S. Ct. 1174 (1998) ("So long as a plea is informed and voluntary, we will enforce a waiver of appeal. United States v. Melancon, 972 F.2d 566 (5th Cir.1992)."); United States v. Abreo, 30 F.3d 29, 32 & n.5 (5th Cir. 1994).

[62] United States v. Salcido-Contreras, 990 F.2d 51,53 (2d Cir. 1993) ("In no circumstance, however, may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless."); United States v. Wiggins, 905 F.2d 51, 53-54 (4th Cir. 1990) ("As this court has recognized, '[i]f defendants can waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial, surely they are not precluded from waiving procedural rights granted by statute.'. . . Accordingly, we hold that a defendant who pleads guilty, and expressly waives the statutory right to raise objections to a sentence, may not then seek to appeal the very sentence which itself was part of the agreement.") (citations omitted); United States v. Rutan, 956 F.2d 827, 829 (8th Cir. 1992) ("Waivers of appeal in plea agreements

statutory right and not a constitutional right.[63] It follows that the right to collaterally attack one's sentence by § 2255 motion is also a statutory and not a constitutional right.[64] The Supreme Court has held repeatedly that a defendant may waive his or her constitutional rights as part of a plea bargain.[65] Accordingly, a defendant also may waive his or her right to file a post-conviction attack.

In United States v. Wilkes, the Fifth Circuit affirmed the trial judge's decision that defendant effectively waived his right to post-conviction relief as part of a plea bargain when the plea hearing colloquy showed the defendant understood the consequences of his actions.[66] The Court noted that sworn declarations at the re-arraignment are "given a strong presumption of verity."[67] The Court upheld the specific language of the plea bargain in which the defendant waived not only the right of—unless the defendant was sentenced based on an upward

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preserve the finality of judgments and sentences imposed pursuant to valid pleas of guilty. . . .We also note that plea agreements are of value to the accused in order to gain concessions from the government. We feel constrained not to interfere with a defendant's right to enter into these agreements. We believe that such waivers should be given their proper effect. We also note that an illegal sentence can still be challenged under 28 U.S.C. § 2255 for habeas corpus relief, so a defendant is not entirely without recourse from an erroneous sentence. Also, a waiver of right to appeal would not prevent an appeal where the sentence imposed is not in accordance with the negotiated agreement") (citations omitted); United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993), cert. denied, 508 U.S. 979, 113 S.Ct. 2980 (1993); United States v. Kuhl, 816 F. Supp. 623 (S.D. Cal. 1993).

[63] Abney v. United States, 431 U.S. 651, 655, 97 S. Ct. 2034, 2038 (1997).

[64] Id.

[65] E.g., Town of Newton v. Rumery, 480 U.S. 386, 392, 107 S.Ct. 1187, 1192 (1987).

[66] 20 F.3d 651 (5th Cir. 1994).

[67] 20 F.3d at 653.

departure—but also the right to a post-conviction review stating, "we see no principled means of distinguishing such waiver [of post-conviction review] from the waiver of a right to appeal."[68]

The waiver language in defendant's plea agreement unambiguously includes giving up his right to appeal or to attack collaterally his sentence in a § 2255 proceeding, except for a claim of ineffective assistance or prosecutorial misconduct. Defendant has not argued prosecutorial misconduct in his § 2255 petition or memorandum in support. Defendant does list three grounds of ineffective assistance. The waiver clause in defendant's plea bargain agreement precludes the review in this § 2255 proceeding of any claim other than defendant's claims of ineffective assistance of counsel.

**C. Ineffective Assistance of Counsel**

Glenewinkel's first ground for relief, that his attorney was ineffective for failing to investigate and mitigate facts in his background history, must be rejected as conclusory and not sufficient to raise a constitutional claim and otherwise not supported by the record. More specifically, defendant contends counsel failed to investigate his background, specifically learning disabilities, harassment in school, and sexual abuse by a neighbor. Defendant does not allege with any specificity what further investigation into these matters would have revealed or explain how it would have altered the outcome of his case, but argues his counsel did not present any of this evidence as mitigation during his sentencing hearing. To the extent the PSR shows the facts were addressed, his argument that the facts were not available for the Court's consideration during sentencing is unsupported by the record.

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[68] Id. See United States v. Portillo, 18 F.3d 290, 291 (5th Cir.), 513 U.S. 893, 115 S. Ct. 244 (1994).

To the extent defendant has identified a matter that was not presented to the District Judge at the time of sentencing, the established rule is that counsel is not required to investigate every conceivable matter. "[C]ounsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary."[69] "To establish that an attorney was ineffective for failure to investigate, a petitioner must allege with specificity what the investigation would have revealed and how it would have changed the outcome of the trial."[70] Defendant does not specify what further information could have been discovered or state why the information would have had any effect on his sentence. Courts are deferential to an attorney's strategic choices, and counsel is not required to advance every non-frivolous argument nor to investigate every conceivable matter.[71] Defendant has not shown there is a reasonable probability that, but for his trial counsel's actions, he would have received a lesser sentence than he did.[72] His conclusory allegations are insufficient to support § 2255 relief.[73] Defendant has not demonstrated deficient performance or prejudice.

Glenewinkel's second ground for relief for relief based on a denial of effective assistance of counsel is that defense counsel was ineffective for failing to inform him of "issues relating to supervised release, prior to signing the Plea." More specifically, defendant argues he had the erroneous belief that "supervised release was a form of parole," and did not understand the "full

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[69] United States v. Green, 882 F. 2d 999, 1003 (5th Cir. 1989).

[70] Miller v. Dretke, 420 F. 3d 356, 361 (5th Cir. 2005).

[71] See Jones, 163 F.3d at 300; Smith, 977 F.2d at 960; Schwander, 750 F.2d at 500.

[72] Grammas, 376 F.3d at 437-38.

[73] See Miller v. Johnson, 200 F. 3d 274, 282 (5th Cir. 2000).

bearing of the consequences of what would be imposed on the Movant" or, apparently, that it could be a life-time term of supervised release. The record refutes his assertions. The transcript of the plea hearing shows defendant told the Court he discussed his case and plea agreement with his counsel. His written plea agreement tells him his maximum supervised release term was "life" and states (in connection with his waivers of rights) his affirmation he understood his sentence would not include parole. The plea hearing shows the Court specifically asked defendant if he understood that the Court could order him to serve a term of supervised release for up to the remainder of his life and defendant responded "Yes, Your Honor." Defendant has not demonstrated deficient performance or prejudice.

Defendant's third ground for relief is that his attorney was ineffective because he did not timely file a notice of appeal. This ground is entirely refuted by the record that shows his trial attorney did file a timely notice of appeal. Defendant also argues his trial attorney, who also served as appellate counsel in the Fifth Circuit, did not file a timely brief on appeal and, due to the late filing, the appeal received no action and was subsequently dismissed as moot. This allegation is incorrect. The Fifth Circuit received defendant's brief on appeal, as well as the Government's Motion to Dismiss and the Court granted the Government's motion to dismiss because defendant's appeal was barred by defendant's waiver of his right to direct appeal. Defendant has not demonstrated deficient performance or prejudice.

## VI. ORDER and RECOMMENDATIONS

Based on the foregoing discussion, it is **recommended** that:

- Glenewinkel's motion to vacate, set aside, or correct his conviction and sentence pursuant to 28 U.S.C. § 2255, and as amended,[74] be **DENIED**; and

- any other requests for relief not expressly granted be **DENIED**.

Further, it is **ordered** that the matter informally referred is **RETURNED** to the District Judge.

## VII. INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT/APPEAL

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either: (1) electronic transmittal to all parties represented by an attorney registered as a Filing User with the Clerk of Court pursuant to the Court's Procedural Rules for Electronic Filing in Civil and Criminal Cases; or (2) by certified mail, return receipt requested, to any party not represented by an attorney registered as a Filing User. As provided in 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b), any party who desires to object to this Report must **file** with the District Clerk and **serve** on all parties and the Magistrate Judge written Objections to the Report and Recommendation within **14 days** after being served with a copy, unless this time period is modified by the District Court.

A party filing Objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the District Court need not consider frivolous, conclusive or general objections. A party's failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report will bar the party from receiving a *de novo* determination by the District Court.[75] Additionally, a party's failure to file timely written objections to the proposed findings,

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[74] Docket nos. 103, 106.

[75] See Thomas v. Arn, 474 U.S. 140, 150, 106 S. Ct. 466, 472 (1985).

conclusions and recommendations contained in this Report will bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.[76]

**SIGNED** and **ENTERED** this 23rd day of October, 2015.

Pamela A. Mathy

**PAMELA A. MATHY**
**UNITED STATES MAGISTRATE JUDGE**

[76] Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000); Douglass v. United Serv. Auto. Ass'n., 79 F.3d 1415, 1428 (5th Cir. 1996).

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