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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

NATHANIEL SOLON,	)	
	)	
Petitioner,	)	
	)	**Civil No. 11-CV-303-B**
v.	)	
	)	**Criminal No. 07-CR-0032-B**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

UNITED STATES' RESPONSE TO THE DEFENDANT'S MOTION TO VACATE SENTENCE UNDER 28 U.S.C. § 2255

On September 7, 2011, the Defendant, Nathaniel Solon ("Defendant"), filed a motion under 28 U.S.C. § 2255 to have his conviction and sentence in this case set aside. In support of his motion, the Defendant alleges a myriad of errors he contends entitle him to a new trial. In his motion, the Defendant has attempted to categorize his claims into allegations concerning 1) prosecutorial misconduct; 2) ineffective assistance of counsel - both trial and appellate; 3) illegal search and seizure; 4) "lost and destroyed evidence;" 5) "indictments;" and 6) "jury prejudice." *See* Defendant's § 2255 Motion, at 7-25. For the reasons set forth below, the Defendant's motion should be denied.

I. BACKGROUND

A. Procedural History

On January 18, 2007, the Defendant was charged by indictment with possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2) (Doc. 1).[1] On October 2, 2007, he entered a plea of guilty to that charge (Doc. 44; 10/2/07, COP Hrg. at 6).

The Defendant was to be sentenced on January 22, 2008, but that hearing was continued three times, each time at his request (Docs. 55, 56, 57, 60, 61, 62, 67, and 68). On April 3, 2008, the Defendant filed a motion to withdraw his plea of guilty (Doc. 73). A hearing on that motion was held on April 16, 2008, after which the court took the matter under advisement (Doc. 77; 4/16/08, Mot. Hrg. at 3-21). On September 17, 2008, the court granted the Defendant's motion to withdraw his plea of guilty, and set his trial for November 3, 2008 (9/17/08, Mot. Hrg. at 8, 13).

On September 25, 2008, the Defendant was charged in a superseding indictment containing both the original charge of unlawfully possessing child pornography, along with an additional charge of attempted receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(1) (Doc. 98). On October 1, 2008, the Defendant entered pleas of not guilty to both charges (Doc. 102). A jury trial

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[1] Any citation to a document within the record will reference the document number in the clerk of court's official docket; *i.e.* (Doc. 1) refers to the first document found in the official docket. If a page number within the document is cited, the citation will be (Doc.1, at 1), *i.e.*, Document 1, at page 1. Citations to transcripts of proceedings will cite the date of the hearing, the type of hearing, and the page number; *i.e.* (11/3/08, Tr. Trans., Vol. I at 1) refers to the trial transcript of November 3, 2008, Volume 1, page 1.) Finally, citations to the PSR will reference the fact that the citation is to the PSR, followed by the paragraph number, followed by the page number, *i.e.*, (PSR, ¶ 1, at 1) refers to the PSR, paragraph 1, at page 1.

commenced on November 3, 2008, and on November 10, 2008, he was convicted on both counts (Doc. 131; 11/10/08, Tr. Trans., Vol. VI at 2-3).

On January 21, 2009, the Defendant appeared for sentencing (Doc. 140). He was sentenced to serve concurrent terms of 72 months imprisonment on each count of conviction, a fine of $400, 5 years of supervised release, and $200 in special assessments (Doc. 141; 1/21/09, Sent. Hrg. at 42-47). The criminal judgment was entered on January 26, 2009 (Doc. 141). The Defendant filed a timely notice of appeal on February 5, 2009 (Doc. 142).

The Defendant appealed his conviction and sentence to the Tenth Circuit Court of Appeals. On appeal, the Defendant raised three issues: 1) he was denied a speedy trial under the Speedy Trial Act; 2) the trial court denied him the right to present a complete defense; and 3) a six-minute absence from the courtroom by the trial judge constituted structural error. A three judge panel, with one dissent, affirmed the Defendant's conviction. *See United States v. Solon*, 596 F.3d 1206 (10th Cir. 2010). The Defendant then asked for rehearing *en banc*, which was denied by the court on April 7, 2010. The Defendant then filed a petition for a *writ of certiorari* with the Supreme Court on June 17, 2010. The Court denied the writ on October 4, 2010. *Solon v. United States*, 131 S.Ct. 213 (2010).

On September 7, 2011, the Defendant filed his instant § 2255 motion, which was timely and well within § 2255's one year limitation period.

B. Historical Facts

The Defendant attempted to receive and possessed child pornography utilizing the Internet by installing and using a peer-to-peer file sharing software program known as Limewire.[2]

At trial, the evidence established that on four separate dates during the summer of 2006, a computer using an IP address assigned to the Defendant was observed offering files containing child pornography for download on a peer-to-peer file sharing network (11/04/08, Tr. Trans., Vol. II at 18-86). On September 18, 2006, ICE Special Agent Nicole Balliett[3], a member of the Wyoming Internet Crimes Against Children Task Force (ICAC),[4] obtained a federal search warrant to search the Defendant's residence for evidence relating to the possession, receipt, distribution, and

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[2] "Peer-to-peer (P2P) networking applications such as Limewire, BitTorrent, Gnutella, eDonkey, Grokster, Kazaa and sundry others operate by directly connecting network participants to one another without the use of a centralized server. *See, e.g.*, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919-20 (2005); *United States v. Shaffer*, 472 F.3d 1219, 1221 n. 1 (10th Cir. 2007). In short, P2P applications allow millions of users to quickly and easily share files stored on their computers over the Internet. *Shaffer*, 472 F.3d at 1221. Although P2P applications have some appropriate and beneficial uses, they unfortunately have become a common tool for purveyors and voyeurs of child pornography." *United States v. Handy*, 2009 WL 151103, *1 (M.D. Fla. 2009) (unpublished, copy attached). For a detailed description of how peer-to-peer file sharing software is installed and operated, *see United States v. Shaffer*, 472 F.3d at 1221-22. *(Also see* 11/05/08, Tr. Trans., Vol. III at 1-53).

[3]Ms. Balliett has married and taken the last name Bailey. She will be referred to throughout this response by her maiden name. But, Attachment A, her affidavit, refers to her by her married name.

[4] The Wyoming ICAC team is a joint task force that consists of Wyoming Criminal Investigation agents, an Immigration and Customs Enforcement agent, and a Federal Bureau of Investigation agent. The task force's mission is to investigate cases involving the exploitation of children facilitated by the use of technology (11/04/08, Tr. Trans., Vol. II at 14-16).

production of child pornography (11/04/08, Tr. Trans., Vol. II at 9-10, 14, 102-107). The search warrant application detailed how ICAC agents had logged a computer, using an IP address assigned to the Defendant's residence, offering child pornography files for download to other peer to peer software users in the summer of June 2006.

After obtaining the search warrant, Agent Balliett, in the company of Wyoming Division of Criminal Investigation (DCI) Special Agent Randy Huff, went to the Defendant's place of employment where they met with the Defendant (*Id*. at 56). The Defendant told the agents he owned a computer that was located at his residence and Limewire software was installed on it. According to the Defendant, he used the Limewire software to download music, computer games, and adult pornography. The Defendant told the agents that he had used Limewire the previous evening, September 20, 2006, when he attempted to download a computer game, Grand Theft Auto, but his anti-virus software had prevented the download (*Id*. at 56-59, 61). The agents informed the Defendant they were going to search his residence and he agreed to accompany them (*Id*. at 59).

After the agents arrived at the Defendant's residence, Balliett continued to question him while Agent Huff and other agents conducted a search of the premises (*Id*. at 59-60). Huff located the Defendant's computer near the kitchen of the home. Huff observed that the computer was turned on and running. Initially, Huff determined that the system clock and other components of the system were functioning properly (11/5/08, Tr. Trans., Vol. III at 69, 71, 83-84). Huff then used a forensic

software tool to preview digital image[5] files on the computer's hard drive. During this initial exam, Huff located files containing adult pornography but no child pornography. He was also able to confirm that the Defendant's computer was the same computer that had been observed by law enforcement personnel during the summer of 2006 offering files containing child pornography for download (*Id*. at 70-80). The software Agent Huff used to conduct his on-scene preview was not capable of locating and examining the contents of files that had been deleted, so he decided to seize the hard drive and conduct a more thorough exam of it at his office (*Id*. at 81-85).

While Huff was conducting his search, the Defendant again told Agent Balliett that he had used Limewire the night before, September 20, 2006, in an attempt to download a computer game known as Grand Theft Auto (11/4/08, Tr. Trans., Vol. II at 61). He also admitted that he had used Limewire in the past to download several files containing adult pornography (*Id*.).

Consistent with the Defendant's statement to Agent Balliett, during his forensic exam of the hard drive Agent Huff found that on the evening of September 20, 2006, shortly after 8:00 p.m., the Limewire program on the Defendant's computer was used to download two computer games - Grand Theft Auto and Madden (11/5/08, Tr. Trans., Vol. III at 118-19).[6] According to Huff, neither of

[5]In the context of files containing child pornography, the term "image" will be used to denote both still and video files throughout this response unless otherwise noted.

[6] Madden is a computer football game named after former coach and commentator John Madden (11/5/08, Tr. Trans., Vol. III at 119).

these downloads were unsuccessful and the anti-virus software on the Defendant's computer deleted at least one of these files (*Id*., 121).[7]

The forensic exam revealed that between 8:51 p.m. and 9:11 p.m., the computer was used to play online poker at a web site known as "PartyPoker.com" by a user who used the screen name "solon40" (*Id*. at 123-24). During his trial testimony, the Defendant testified that he played poker at the PartyPoker.com web site using the screen name "solon40," but could not remember if he had done so on the night of September 20, 2006 (11/6/08, Tr. Trans., Vol. IV at 75-76, 99).

At 9:16 p.m., within five minutes of the time the last poker hand was played, video files with names highly consistent with child pornography began to download to a folder set up by the Limewire program known as the "incomplete folder."[8] According to Agent Huff, the incomplete folder is where files that are being downloaded are "assembled" (11/5/08, Tr. Trans., Vol. III at 42, 106-07, 125). Agent Huff testified that from 9:16 p.m. until 10:01 p.m., a total of forty-six digital video files, all of which had names consistent with child pornography, were downloaded to the Defendant's computer (*Id*. at 125-127). Limewire has a function known as "preview" that allows a user to view the content of digital still image and video files as they are in the process of being

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[7] Huff testified that his exam of the hard drive revealed that the Defendant had anti-virus software installed on his machine and that it was working properly. Huff found no active viruses on the hard drive (11/5/08, Tr. Trans., Vol. III at 93-94).

[8] Agent Huff testified that while every file that downloaded on the night of September 20, 2006, had a name consistent with child pornography, several of the files he viewed actually contained adult pornography.

downloaded (*Id*. at 126). Huff observed that during the download of the forty-six files, twenty-nine of those files had been previewed (*Id*. at 163).[9]

The government introduced seven digital videos depicting children engaged in sexually explicit conduct that were downloaded on September 20, 2006, between 9:15 p.m. and 10:00 p.m., that were recovered from unallocated space on the Defendant's hard drive (*Id*. at 133). Each of the seven exhibits were recovered from the unallocated space on the Defendant's hard drive (*Id*. at 111-12). Huff stated that it was apparent from his exam of the Defendant's hard drive that the Defendant would enter a search term consistent with child pornography, download files that were offered for download in response to the search term, view the downloaded files - or at least attempt to view them - and then delete the child pornography files from the hard drive (*Id*. at 125, 129; 11/6/08, Tr.Trans., Vol. IV, at 49-50).

At trial, the Defendant testified on his own behalf. He claimed he did not remember his computer use on September 20, 2006, and denied that he had ever attempted to download or possess child pornography (11/6/08, Tr. Trans., Vol. IV at 69-70). Additionally, the Defendant called Tami Loehrs, a forensic examiner, who testified that she found no evidence that the Defendant viewed the child pornography found on his hard drive and that it was possible that the Defendant's computer

[9] Huff testified that utilizing the preview function does not always result in being able to view the content of a file that is being downloaded. Huff stated, "Limewire notes that the preview function was hit or the button was pressed during the download process, but we can't always tell whether the actual content of the movie was viewable. Sometimes when the button was pressed there may be no file content to play. Sometimes there's a little bit of file content, but it still won't play." (11/05/08, Tr. Trans., Vol. III at 130).

was compromised by some type of malware that would allow a third party to access the computer (*Id*. at 29, 59-61). On November 10, 2008, the jury found the Defendant guilty of possession and attempted receipt of child pornography (Doc. 131).

The trial judge ordered that a presentence report (PSR) be prepared (11/10/08, Tr. Trans., Vol. VI at 4-5). The author of the PSR found that the Defendant's final offense level was 34 and that his criminal history score of six points placed him in Criminal History Category III (PSR, ¶ 19 at 6; ¶ 23-29 at 7-10). The advisory sentencing guideline range for the Defendant was 188 to 235 months imprisonment (*Id.* ¶ 53 at 14).

At the Defendant's sentencing, the court declined to follow the recommendations of the PSR in regards to at least one offense characteristic, a two offense level enhancement for obstruction of justice (1/21/09, Sent. Hrg. at 12). The court also determined that the Defendant was entitled to a variance of seven offense levels so that his final offense level was 25, resulting in an advisory sentencing range of 70 to 87 months (01/21/09, Sent. Hrg. at 42). In the end, the Defendant was sentenced to a term of 72 months imprisonment on each count, the sentences to run concurrently, a fine of $400, five years supervised release, and a $200 special assessment (*Id*. at 42-47; Doc. 141).

As noted above in the procedural history of the case, the Defendant appealed his conviction and sentence to the Tenth Circuit Court of Appeals. In his appeal, the Defendant argued that: 1) he was denied a speedy trial under the Speedy Trial Act; 2) the trial court denied him the right to present a complete defense; and 3) a six-minute absence from the courtroom by the trial judge constituted

structural error. The Defendant did not contest the sufficiency of evidence to sustain his conviction. A three judge panel, with Judge Lucero dissenting, affirmed the Defendant's conviction. *See United States v. Solon*, 596 F.3d 1206 (10th Cir. 2010). The Defendant then asked for rehearing *en banc*, but this was denied by the court on April 7, 2010. The Defendant then filed a petition for a *writ of certiorari* with the Supreme Court on June 17, 2010. The Court denied the writ on October 4, 2010. *Solon v. United States*, 131 S.Ct. 213 (2010).

Other facts pertinent to the issues raised in the Defendant's Motion will be presented below.

II. ARGUMENT

A. Rules Governing § 2255 Motions/Standard of Review

Ordinarily, a party may not challenge the legality of matters that could have been resolved on direct appeal. *United States v. Frady*, 456 U.S. 152, 165-68 (1982); *United States v. Cook*, 997 F.2d 1312, 1320 (10th Cir. 1993). Absent making one of the following two showings, a party who has failed to raise an issue on direct appeal is procedurally barred from presenting the issue in a § 2255 motion.

1. Cause–Actual Prejudice

A defendant may collaterally attack a conviction or sentence on a legal basis not appealed if he shows cause for his failure and actual prejudice resulting from it. *Frady*, 456 U.S. at 167. To obtain collateral relief in this circumstance, a prisoner must clear a significantly higher hurdle than would exist on direct appeal. *Id.* at 166. To show "cause," a defendant must show that some

external impediment prevented him from raising the claim during the original proceedings in his case, or on direct appeal. *Murray v. Carrier*, 477 U.S. 478, 492 (1986). A defendant can show "cause" by demonstrating that his claim was so novel that its legal basis was not reasonably available to his counsel. *See Reed v. Ross*, 468 U.S. 1, 16 (1984). But neither ignorance nor inadvertence is sufficient in this regard, nor is a failure to recognize the factual or the legal basis for the claim. *Id.*

In evaluating the degree of prejudice from error, a court is to take account of the total context of the events at trial. *Frady*, 456 U.S. at 169. A defendant must show not that the errors *possibly* prejudiced him, but rather that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. *Id.* at 170.

In the present case, the Defendant makes no effort to show the necessary cause to overcome his procedural default other than at page 27 of his motion where he claims that the "challenges" he has raised in Grounds One, Two, Four, Five, and Six of his motion were not raised due to ineffective assistance of counsel. He mentions no other external impediment that would have defeated his ability to make his claims at trial or on appeal except for his assertion of ineffective assistance of counsel as to twenty of the twenty-one errors (challenges) claimed.[10] Accordingly, based on the language of his motion, the government believes it proper not to proceed on the cause-actual prejudice standard of *Frady* but solely upon the second exception - ineffective assistance of counsel.

[10] The one error that was raised by trial counsel that is again raised in this § 2255 motion is that contained in Ground Three, relating to the failure of the government agents to seize the Defendant's entire computer system. The Defendant addresses this issue in both Ground Three and in his allegations concerning the ineffectiveness of appellate counsel - Ground Two.

2. Ineffective Assistance of Counsel

A claim of ineffectiveness of counsel may overcome the procedural bar resulting from failing to raise an issue on direct appeal. To show ineffective assistance of counsel, a defendant must establish that his attorney's performance was deficient and that, but for that deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* at 694. In the "trial context," for example, a court must find that, absent the errors, the fact-finder would have had a reasonable doubt as to guilt. *Id.* at 695. It is a defendant's burden to show the decision reached likely would have been different absent the errors. *Id.*

In evaluating whether a defendant's counsel was deficient, a court looks for errors so serious that the counsel was not functioning as Sixth Amendment counsel. *Id.* at 687. Judicial scrutiny must be highly deferential. *Id.* at 689. There is a strong presumption that counsel's conduct was adequate and within the range of reasonable professional assistance. *Id.* at 687, 690. Hindsight is to be avoided, and courts should consider that intensive scrutiny can hurt the independence of defense counsel, can discourage their taking cases, and can undermine the trust between the defendant and his attorney. *Id.* at 690. The proper standard for measuring attorney performance is not that of perfection. *United States v. Haddock*, 12 F.3d at 955-56. Rather, it is that of reasonably effective assistance. *Gillette v. Tansy*, 17 F.3d 308, 310-11 (10th Cir. 1994). Moreover, as the Tenth Circuit

noted in *Gillette*, a court's review of an attorney's performance is highly deferential and must be conducted, as much as possible, without regard to the often distorting effects of hindsight. *Id.* at 311.

> Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case.

Id., quoting Strickland v. Washington, 466 U.S. at 689.

Even if he is able to show deficient counsel, a defendant must still affirmatively prove prejudice. *Strickland v. Washington*, 466 U.S. at 693. In this regard, it is not sufficient to show errors had some conceivable effect on the outcome of the proceeding. *Id.* Only errors that undermine the reliability of the proceeding qualify. *Id.* A defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A defendant need not show by a preponderance that the deficient performance altered the outcome of the case, but he must show a reasonable likelihood that the decision reached would have been different absent the errors. *Id.* at 693-95.

A defendant challenging his convictions based upon ineffectiveness of counsel must do more than offer conclusory allegations. He must make particularized and specific factual averments that, if proved, would demonstrate his attorney's ineffectiveness and the resulting prejudice. *Hatch v. Oklahoma*, 58 F.3d 1447, 1457 (10th Cir. 1995); *United States v. Fisher*, 38 F.3d 1144, 1147 (10th

Cir. 1994). This is so even for *pro se* defendants, whose pleadings are to be liberally construed. *Fisher*, 38 F.3d at 1147.

As measured against these standards, it is clear the Defendant's motion cannot be sustained.

B. Defendant's Prosecutorial Misconduct Claims

1. Prosecutor Acted in Bad Faith by Ignoring the Defendant's Right to the Presumption of Innocence (Ground One, Challenge I)

In the Defendant's first challenge under the rubric of "prosecutorial misconduct" he alleges that his "Fifth Amendment guarantee of due process was violated when [the prosecutor], in bad faith, ignored my right to be presumed innocent." Defendant's Memorandum, at 3. This is so, he claims, because the trial prosecutor did not have his "investigator dig further for the truth to ensure 'the innocent are not unjustly charged.'" *Id.*, at 10. However, the Defendant fails to offer any cogent argument or authority in support of this contention other than regurgitating arguments made by his trial attorney during closing argument concerning the state of the evidence in his case (*See* 11/10/08, Tr. Trans., Vol. VI at 28-48). This claim, as set forth by the Defendant, borders on the ridiculous. He has failed to allege any facts that would constitute a deficiency on the part of his attorney. Additionally, the Defendant has failed to allege or demonstrate prejudice as required by *Strickland*. This claim must be dismissed.

Moreover, there is simply nothing in the record to suggest that the prosecution team in this case ignored or glossed over evidence that would have exonerated the Defendant. As the Tenth Circuit noted,

> [t]he government's case was strong. Mr. Solon's computer was observed online offering child pornography for download on June 23 and August 9, 10, and 11, 2006. A search of Mr. Solon's computer's hard drive revealed that on September 20, 2006, forty-six files with names consistent with child pornography were downloaded using Limewire, a peer-to-peer file sharing program. Furthermore, Mr. Solon admitted to using Limewire on September 20 to attempt to download two computer games. Additionally, the government presented evidence that Mr. Solon was playing online poker on his computer less than five minutes before the child pornography files were downloaded.

United States v. Solon, 569 F.3d 1206, 1212 (10th Cir. 2009) (emphasis added).

Further, as the Defendant acknowledges in his own memorandum, the government investigators literally spent "weeks" examining the Defendant's hard drive and preparing for trial in this case (11/6/08, Tr. Trans., Vol. IV at 5; Defendant's Memorandum, at 116). That effort - involving literally hundreds of hours in preparation - revealed that the Defendant knowingly received and possessed child pornography.

The Defendant's claim that the prosecutor ignored his right to be presumed innocent and that his attorney was somehow deficient in not bringing this claim forth is simply nonsensical, wholly lacking in merit, and must be denied.

2. Misleading the Jury into Believing the Government's Computer Forensic Expert Was Highly Qualified (Ground One, Challenge II)

Next, and again without offering any compelling reason whatsoever as to why he is only now raising this issue for the first time in the instant § 2255 proceeding - other than a one sentence claim that his attorneys were ineffective for failing to raise it before - the Defendant contends that the trial prosecutor somehow committed a fraud upon the court and jury by misleading them concerning the

credentials of Randy Huff, the government agent who conducted the forensic exam in this case. According to the Defendant, "[the trial prosecutor] . . . purposely misled the court by diminishing the skills of my forensic computer experts while overinflating the skills of Agent Huff." Defendant's Memorandum, at 12-13. However, in support of this claim the Defendant offers nothing more than a rehash of the testimony of Huff juxtaposed against the testimony of his own forensic expert - Tammi Loehrs.

In the end, the essence of this claim is that the jury should have believed the defense expert, not the government's. However, this is hardly the type of claim that merits review in a § 2255 motion. The Defendant fails to show any deficiency on the part of his attorney or the requisite showing of prejudice; rather, this claim is nothing more than a sufficiency of the evidence claim which cannot be raised or considered in the first instance in a § 2255 motion proceeding. *United States v. Payton*, 436 F.2d 575, 577 (10th Cir. 1970).

3. Falsification of Evidence (Ground One, Challenge III)

The Defendant next claims that the trial prosecutor "in bad faith, falsified evidence in order to extort a guilty plea from me." Defendant's Motion, at 8. Essentially, the Defendant claims that he was tricked into pleading guilty by evidence manufactured by the trial prosecutor. However, the facts do not bear out this contention. Additionally, the Defendant was subsequently allowed by the court to withdraw his guilty plea and proceed to trial. Thus, he cannot show he was prejudiced by entering his guilty plea.

By way of background, the Defendant's first trial was set to commence on October 2, 2007. During the weekend leading up to the Defendant's trial, the case agents examining the Defendant's hard drive discovered a registry created by the Defendant's operating system that indicated a software program used to "burn" or create CDs was accessed on the evening of September 20, 2006 (Doc. 50). However, it is important to note that while the CD burning software was accessed, there is no evidence to show that a CD was - or was not - created. Thus, in the prosecutor's statement, the government drew an inference that the Defendant had been creating CDs based upon the downloading of the child pornography, the accessing of the CD burning software, and the subsequent deletion of the child pornography images from the Defendant's hard drive.

While the Defendant offers speculation and conjecture that the trial prosecutor falsified evidence, such is simply not the case. Moreover, while these facts may, or may not, have influenced the Defendant's decision to enter a guilty plea on October 2, 2007, he was allowed to withdraw that guilty plea on a subsequent date. Thus, the Defendant simply cannot show that his attorney was somehow deficient within this scenario or that he suffered any prejudice when in fact he got what he wanted, a trial. Under these circumstances he is not entitled to any relief on this baseless claim.

4. Vindictive Prosecution (Ground One, Challenge IV)

The Defendant next claims that he was the victim of a vindictive prosecution. Again, the only impediment the Defendant claims prevented him from raising this issue prior to this proceeding

was the ineffective assistance of counsel. Thus, the government will analyze this claim under *Strickland.*

As noted above, the Defendant pleaded guilty to the sole count contained in the original indictment, possession of child pornography, on October 2, 2007 (Doc. 44; 10/2/07, COP Hrg. at 6). The court allowed the Defendant to withdraw his guilty plea on September 17, 2008. Thereafter, on September 25, 2008, the Defendant was charged in a superseding indictment with the original possession of child pornography charge, along with an additional charge of attempted receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(1) (Doc. 98). He now claims, for the first time, that he is the victim of a vindictive prosecution constituting a violation of his right to due process. Further, by implication, he alleges that his trial attorney was ineffective for not raising this claim before the trial court.[11] Not so.

To demonstrate prosecutorial vindictiveness, a defendant must prove either (1) "actual vindictiveness, or (2) a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness." *United States v. Lampley*, 127 F.3d 1231, 1245 (10th Cir. 1997). If the defendant proves either element, the burden shifts to the government to justify its prosecutorial decision based on "legitimate, articulable, objective reasons." *United States v. Raymer*, 941 F.2d 1031, 1040 (10th Cir. 1991). If the defendant fails to prove either element, the trial court need not

[11] In the "challenge" alleging ineffective assistance of appellate counsel, the Defendant does not claim his appellate attorney was ineffective for not raising this issue on direct appeal. *See* Defendant's Memorandum, 122-127.

address the government's justification for its prosecutorial decision. *Id.* Merely by the appearance of vindictive motives, vindictiveness may not be presumed. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *United States v. Goodwin*, 457 U.S. 368 (1982). In determining whether the government has engaged in prosecutorial vindictiveness, a court must determine whether the prosecution engaged in conduct that would not have occurred but for the prosecution's desire to punish the defendant for exercising a specific legal right. *United States v. Contreras*, 108 F.3d 1255, 1262 (10th Cir. 1997).

A prosecutor's discretion to charge is very broad, *United States v. Goodwin*, 457 U.S. 368, 382 (1982), and in most circumstances prior to an actual trial he may choose to file additional or harsher charges against a defendant without the doctrine of prosecutorial vindictiveness coming into play. The Supreme Court has made clear that "the Due Process Clause is not offended by all possibilities of increased punishment . . . but only by those that pose a realistic likelihood of vindictiveness." *United States v. Goodwin*, 457 U.S. at 384 (*citing Blackledge v. Perry*, 417 U.S. 21, 27 (1974)). *See also Wasman v. United States*, 468 U.S. 559, 568-69 (1984). Recognizing that the possibility of vindictive motivation is more likely in charging decisions made after a conviction rather than before trial, *Goodwin*, 457 U.S. at 381, the Supreme Court has held that a presumption of vindictiveness arises when a prosecutor brings a superseding indictment, increasing the charges against a defendant, after a person has exercised his legal right to a trial *de novo*. *Blackledge v. Perry*, 417 U.S. at 27-28. In the pretrial setting, however, a presumption of vindictiveness has generally been found not to apply. To prove vindictive prosecution at the early stages of a criminal

prosecution, a defendant must establish that the enhanced charge or sentence was motivated by actual vindictiveness. *Wasman*, 468 U.S. at 568. In fact, the Ninth Circuit has held that no vindictive prosecution occurs "when additional charges are added during pretrial proceedings" because "[p]rosecutors often threaten increased charges and, if a guilty plea is not forthcoming, make good on that threat."

The Tenth Circuit has recognized that the very purpose of instituting criminal proceedings against an individual is to punish; therefore, the mere presence of a punitive motivation behind prosecutorial action does not render such action constitutionally infirm. *United States v. Contreras*, 108 F.3d at 1262 (*citing United States v. Goodwin*, 457 U.S. at 372). However, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Id*. (*quoting Bordenkircher v. Hayes*, 434 U.S. at 357). Therefore, the Tenth Circuit has directed that the focus in analyzing a claim of prosecutorial vindictiveness should be whether "as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or punitive animus toward the defendant because he exercised his specific legal right." *United States v. Raymer*, 941 F.2d 1031, 1042 (10th Cir.1991) (*quoting United States v. Gallegos-Curiel*, 681 F.2d 1164, 1169 (9th Cir. 1982)).

Vindictive prosecution claims usually turn on the specific facts and circumstances present in each distinct case. *United States v. Raymer*, 941 F.2d at 1039 (*citing United States v. Schoolcraft*, 879 F.2d 64, 67 (3d Cir. 1989)). As stated above, to establish a claim of vindictive prosecution, a

defendant must show either: (1) actual vindictiveness, or (2) a reasonable likelihood of vindictiveness, which then raises a presumption of vindictiveness. *United States v. Lampley*, 127 F.3d at 1245. Once the defendant successfully establishes either, the burden shifts to the prosecution to justify its charging decision with "legitimate, articulable, objective reasons." *Id*. If the defendant is unable to prove actual vindictiveness or a realistic likelihood of vindictiveness, a trial court need not reach the issue of government justification. *Id*.

The Defendant cannot make out a claim of vindictiveness in the present case. In fact, there is absolutely nothing in the record to support a claim of actual vindictiveness or that would even remotely suggest that the trial prosecutor was motivated by animus or vindictiveness against the Defendant. Rather, as the trial record makes clear, the forensic analysis of the Defendant's hard drive revealed that the Defendant, in addition to possessing images of child pornography, also attempted to download a number of images of child pornography on September 20, 2006 (*See* 11/5/08, Tr. Trans., Vol. III at 160-66). By adding a receipt charge to the superseding indictment, the government was clearly attempting to muster the strongest case possible against the Defendant. This is clearly permissible. Additionally, because the new charge was filed prior to a trial in this matter, no presumption of vindictiveness attaches to his case. *United States v. Contreras*, 108 F.3d at 1262.

Given the record present here, there is no justification whatsoever for a claim of vindictive prosecution on the part of the government. There is nothing to suggest actual vindictiveness nor,

given the fact that a superseding indictment was sought before a trial was held in this matter, can there be a presumption of vindictiveness. The Defendant simply has not made out a claim that his trial attorney was constitutionally deficient for not pursuing this claim.

This "challenge" must be rejected.

5. Failure to Introduce the Hard Drive (Ground One, Challenge V, and Ground Two, Challenge I)

In his fifth challenge under the heading of prosecutorial misconduct, the Defendant contends that it was prosecutorial misconduct for the trial prosecutor not to introduce the actual hard drive into evidence during the trial. Defendant's Motion, at 8. The essence of this argument is set forth by the Defendant in his memorandum, where he claims that,

> [d]uring trial, Mr. Anderson never moved for the introduction of the hard drive into evidence. A photograph of the hard drive was introduced as Government Exhibit 21, but the hard drive itself was never introduced or received. Since the hard drive was Mr. Anderson's ONLY evidence, it should have been submitted to the Court. This entire case is based on what is contained in that hard drive. Without the hard drive, there is no case.

Defendant's Memorandum, at 36. He also claims in Ground Two, Challenge I, that his attorney was ineffective for failing to object to this alleged error. *Id.*, at 121.

The Defendant fails to cite any legal authority for this rather novel proposition, and the government is unaware of any case, anywhere, that requires the prosecution to introduce the actual hard drive that contains the digital images of child pornography into evidence in order to sustain a

conviction for either possession or attempted receipt of child pornography. Thus, it can hardly be argued that the Defendant's attorney was somehow deficient for failing to litigate this meritless issue.

The gravamen or essence of the crimes for which the Defendant was convicted relate to the possession and seeking out of child pornography. Images of child pornography, in the form of video clips, that were found on the hard drive were introduced into evidence. A picture of the hard drive was introduced. While the Defendant argues that the hard drive should have been introduced, he never tells us why or what prejudice he suffered as a result of this perceived failure. The government would note that in a murder case the body is not introduced, in an arson case the burned structure is not introduced, and in a sexual assault case the person of the victim is not introduced as an exhibit.

The Defendant's attorneys were not deficient in failing to raise this frivolous issue.

6. Suppression of Material Evidence (Ground One, Challenge VI)

The Defendant next argues that "[m]y Fifth Amendment right to due process was violated when [the trial prosecutor] in bad faith suppressed material evidence from the court. Defendant's Memorandum, at 40. According to the Defendant, the material evidence the prosecutor suppressed was the fact that a duplicate forensic copy of the Defendant's hard drive was made by DCI agents as part of the forensic exam of the Defendant's hard drive. According to the Defendant, "[the trial prosecutor] kept Agent Huff's copy secret, which left it solely in the hands of the prosecution, violating my Fifth Amendment right to due process." *Id.*, at 42. Again, viewing this claim through

the prism of *Strickland*, the Defendant cannot demonstrate either a deficiency on the part of his attorney or any prejudice.

Early on in this case, the court ordered that the Defendant's hard drive be placed in the registry of the court and that neither party could examine the hard drive without the presence of the representative of the other (Doc. 23). In compliance with that order, the government caused the original hard drive to be placed in the custody of the clerk of court. Prior to the order of the court, in fact, and within forty-eight hours of the seizure of the hard drive, a forensic copy of the hard drive had been made. The forensic copy of the hard drive remained in the custody of DCI throughout the proceedings. But, once the court ordered that the original hard drive be placed in the registry of the court, the forensic copy was segregated and not accessed by anyone.

The parties found this arrangement unworkable and asked the court to rescind its order of June 11, 2007 (Docs. 61 and 65). The court modified its original order of June 11, 2007, and on March 5, 2007, entered an order that provided that the government could have unfettered access to the forensic hard drive for forensic exam purposes (Doc. 66). Thereafter, the DCI agents again accessed the forensic copy of the hard drive, as did defense experts.

Under the facts set forth above, the government would submit that there is nothing to suggest that the Defendant's attorney was somehow deficient in not bringing to the attention of the court the fact that the government had segregated a forensic copy of the hard drive while the original was held

by the clerk of court. Further, the Defendant cannot in any way, shape, or form demonstrate any type of prejudice.

This claim is wholly lacking in merit and the Defendant is not entitled to any relief thereon.

7. Denial of Right to Fair and Impartial Jury by Showing Child Pornography to Jury (Ground One, Challenge VII and Ground Two, Challenge II)

The Defendant next argues that it was prosecutorial misconduct for the government to introduce and publish to the jury the images of child pornography. Defendant's Memorandum, at 50. He argues that "given that both sides were in agreement that child pornography was on my computer, there was absolutely no need to show child pornography to the jury." *Id.* at 51. He posits that it was particularly egregious to allow into evidence Government Exhibits 10, 11, and 12 because they were not found on his computer during the forensic process. *Id.* at 52. The Defendant notes that his trial attorney strongly lodged objections regarding this evidence but that his appellate attorney was deficient in not raising "this very important issue" on appeal. *Id.* at 127. Additionally, he contends that his appellate attorney should have argued that any images of child pornography - charged or uncharged - should not have been introduced and published to the jury "until it could be proven that I viewed, copied, or otherwise knowingly possessed it." *Id.* at 124. But, at the core of the Defendant's objection is his claim that "[the trial prosecutor], in bad faith, used 'unfair prejudice' in showing child pornography to the jury in an attempt to distract them from the facts of this case and to 'suggest decision on an improper (emotional) basis.'" *Id.* at 51. He also replicates this

argument in Ground Five, Challenge II, but adds the twist that the child pornography files were somehow compromised or not authentic. *See* Defendant's Memorandum, at 179-182.

As this contention deals with the ineffectiveness of appellate counsel, it is important to note the particular standards relating to such claims.[12] "Although *Strickland* set forth standards for determining the effectiveness of trial counsel, [the Tenth Circuit] has applied those same standards in assessing the effectiveness of appellate counsel." *United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995). The United States would note that claims of appellate counsel ineffectiveness are often based on counsel's failure to raise a particular issue on appeal. *See Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir.2003). A defendant does not have the right to compel counsel to raise particular issues on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, counsel is entitled to use her professional judgment to determine which points best deserve attention in appellate briefs. *See generally Id.* at 750-54. "[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing *Jones v. Barnes*, 463 U.S. 745, (1983)). Although it is possible to bring an ineffective assistance claim based on counsel's failure to raise a particular issue, "it is difficult to demonstrate that counsel was incompetent." *Id*.

[12] Trial counsel for the Defendant sought by means of a motion in limine and objections at trial to prevent the government from introducing the images of child pornography (Doc. 87; *See generally* 11/5/08, Tr. Trans., Vol. III at 130-133).

In order to evaluate appellate counsel's performance, "we look to the merits of the omitted issue." *Cargle v. Mullin*, 317 F.3d at 1202. "If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance." *Id*. On the other hand, "if the omitted issue has merit but is not so compelling, [the reviewing court must assess] the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance." *Id*. (citing *Smith v. Robbins*, 528 U.S. at 288). Applying these standards to the Defendant's claims concerning the admission of child pornography images at his trial, it is obvious the claims must be denied.

While the Defendant alleges his appellate attorney should have argued on appeal that it was error for the trial court to admit and allow the jury to view images of child pornography, he offers absolutely no legal authority on these points whatsoever. First, it is important to keep in mind the standard of review for such claims on appeal. On appeal, trial court rulings relating to the admission of evidence are reviewed under a highly deferential standard - abuse of discretion. *See United States v. Mares*, 441 F.3d 1152, 1156 (10th Cir. 2006) (discussing Rule 404(b)); *United States v. Call*, 129 F.3d 1402, 1405 (10th Cir. 1997) (discussing Rule 403). Thus, whether to admit or exclude such evidence lies within the sound discretion of the trial court, *See United States v. Harrison*, 942 F.2d 751, 759 (10th Cir. 1991), and "[the Tenth Circuit Court of Appeals] will not reverse a district court's ruling if it falls within the bounds of permissible choice in the circumstances and is not

arbitrary, capricious or whimsical." *Mares*, 441 F.3d at 1156. *See also Call*, 129 F.3d at 1405. Allowing the government to introduce and publish digital images of child pornography in a child pornography prosecution can hardly be described as capricious or whimsical.

Generally, electronically stored information ("ESI") in the form of files found on a computer are admissible into evidence if they can pass the following analysis: (1) is the evidence relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under 401, is it authentic as required by Rule 901(a) (can the proponent show that the electronically stored evidence is what it purports to be); (3) if the electronically stored evidence is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807); (4) is the form of the electronically stored evidence being offered an original or duplicate under the original writing rule, or if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001-1008); and (5) is the probative value of the electronically stored evidence substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance. *Loraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 538 (D. Maryland 2007).

As noted above, the superseding indictment in this case charged the Defendant with possession and attempted receipt of child pornography (Doc. 98). Count One, charging possession of child pornography, alleged:

> "[o]n or about September 20, 2006, in the District of Wyoming, the Defendant . . . , did knowingly possess a Maxtor Hard Drive, serial number Y35609QE, *containing one or more digital images of child pornography*, said image or images being produced using materials, including the Maxtor Hard Drive, that was mailed, or shipped, or transported in interstate or foreign commerce.

Id.

Likewise, Count Two of the superseding indictment alleged the Defendant:

> "[o]n or about September 20, 2006, [the Defendant] did knowingly attempt to receive child pornography that had been mailed, shipped, or transported in interstate commerce, to wit: via the internet using a computer, the Defendant *attempted to download one or more digital image files depicting children engaged in sexually explicit conduct*."

Id.

Given the nature of these charges, any digital image of child pornography that was found on the Defendant's hard drive, particularly those that were introduced to the computer on September 20, 2006, constituted relevant evidence under Rule 401, F.R.E.. Exhibits 22, 23, 24, 25, 26-B, 27-B, and 28-B were all digital video clips of children engaged in sexually explicit conduct which were downloaded to, and recovered from, the Defendant's computer. According to the testimony of Agent Huff, these images were introduced to the computer on September 20, 2006, between 9:15 p.m. and 10:00 p.m. by use of the Limewire software program installed on the Defendant's computer. The forensic evidence revealed that a function of the Limewire software that allows a user to view an image file, both still and video, as it is being downloaded was utilized when five of these exhibits/videos were downloaded (11/5/08, Tr. Trans., Vol. III at 133, 136, 139, 149-150; *Also See*

Govt. Exhibit 31A [time line providing information concerning child pornography downloads of September 20, 2006]).[13] Additionally, the United States introduced evidence that: 1) the computer these vidoes were recovered from belonged to the Defendant (11/4/08, Tr. Trans., Vol. II at 57-63); 2) the Defendant admitted he had used the computer and the Limewire software during the evening hours of September 20, 2006 (*Id*, at 57); and 3) the videos had not been altered, edited, or otherwise changed (11/5/08, Tr. Trans.,Vol. III at 133-149). Clearly each of these exhibits were relevant, authentic, non-hearsay, and exactly the same as the file that existed on the hard drive.

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[13] Reviewing the highly suggestive names of these files leaves little doubt that the content relates to child pornography:

Exhibit 22 - "[PTHC] Porn _BB Sex_Not Yet 2yos Masturbation Aid_Baby Girl Spreads WIDE For Sex Relief-Infants Pretty Cunt Illegally Fellated By Understanding Pedo Mom !! _2.16.mpg"

Exhibit 23 - "A PRETEEN- Part 1. 12 Or 13 Year Old Girl Pleasuring Her Pretty Young Young Cunt- Masturbation- preteen sex pedo lolita @ygold.mpg"

Exhibit 24 - "T-59107332-Babyshivid-Samples 3yo gets it every way imaginable (pthc pedo babyfuck}5m46s.mpg"

Exhibit 25 - "T-133785604-[R@ygold style] - R3T3 - many girls from 12yo to 14yo having sex experiences kiddie pedo boy lolita R@ygold underage.mpg"

Exhibit 26B - "BabyJ 01 (pthc pedo Preteen) - Helping big cock inside! heavy breathing and gasps of 'yeah' as little 5yos kiddy cunt so greatly relieved!!! (child sex reality) (Low Res) .46s.mpg" Exhibit 27B - "fdsa7- 10yo girl and 6yo boy pedo r@ygold hussyfan lolitaguy lsm pthc babyshivid.mpg"

Exhibit 28B - "PEDO - [Illegal - 10yo and 9yo lolitas (25min17sec 67.0mb).mpg."

Based upon the Defendant's papers, it appears his real objection to the introduction of the digital images of child pornography is his contention that by introducing this material the government was attempting to unfairly prejudice the jury and the exhibits should have been excluded pursuant to Rule 403. This argument is foreclosed by the law in this circuit. In *United States v. Campos*, 221 F.3d 1143, 1148 (10th Cir. 2000), the Tenth Circuit rejected a defendant's argument that, under Rule 403, and "in light of his offer to stipulate that those images constituted child pornography, there was no reason to show them to the jury and to do so was unduly prejudicial." The court explained that, in contrast to the evidence at issue in *Old Chief v. United States*, 519 U.S. 172 (1997), the offer to stipulate in *Campos* involved "the gist of the government's current case against [the defendant] - the two pornographic images that he allegedly transported via computer." *Campos*, 221 F.3d at 1149.

Likewise, in the case against the Defendant, he was charged with possessing and attempting to receive digital images of child pornography as charged in the indictment - the very items that were admitted as evidence in Exhibits 22, 23, 24, 25, 26(b), 27(b), and 28(b). These exhibits were the crux of the government's case against the Defendant. The government was entitled to prove its case, and given the charges against the Defendant, those images were not unfairly prejudicial under Rule 403. *See Old Chief*, 519 U.S. at 186-87 (explaining that it is "unquestionably true as a general matter," that "the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force

of the case as the Government chooses to present it"). Given the state of the law in this circuit concerning the admissibility of child pornography images, the Defendant's appellate attorney was clearly within the bounds of reasonable and competent assistance of appellate counsel in deciding not to raise this issue on appeal.

The Defendant also makes an ancillary argument that the child pornography images should not have been admitted without proof that he had viewed them. In this case, as noted above, the government did present circumstantial evidence that the Defendant viewed the five images designated as Government's Exhibits 22, 23, 24, 25, 26(b) and 27(b) during the download process. However, as Agent Huff testified, proof that a file was viewed simply cannot be established with absolute certainty through the forensic examination of electronic storage media (11/5/08, Tr. Trans., Vol. III at 145). Thus, the Defendant would set a standard of admissibility that might never be achieved without either an admission by a defendant, eye-witness testimony, or some other form of direct evidence. Most collectors of child pornography do not ask the neighbors over to watch as they download and view child pornography. The Defendant's contention that his appellate attorney was ineffective for not advancing the argument that the trial court was capricious and whimsical for not requiring absolute proof that he viewed the images of child pornography is simply without merit.

Turning now to Exhibits 10, 11, and 12. These were digital images of child pornography that were being offered for download from the Defendant's computer on June 23, 2006 (11/5/08, Tr. Trans., Vol. III at 52-56). While the Defendant is correct that these images were not recovered

during the forensic review of the Defendant's hard drive, that fact alone does not effect their admissibility. Indeed, Agent Huff testified that on June 23, 2006, one of his fellow investigators, DCI Special Agent Flint Waters, was able to locate a computer using a specific internet protocol address and "browse" or review all of the files that computer was offering for download to other peer-to-peer software users. (*Id.*). As part of that "browse," Agent Waters was able to capture the SHA1 value of each file being offered for download by the Defendant's computer. (*Id.* at 56-57). Since every file has a unique SHA1 value - or "digital fingerprint," as described by Agent Huff - there was no doubt that the three images embodied in Government Exhibits 10, 11, and 12 were exactly the same as the files being offered for download on June 23, 2006, by the Defendant. (*Id.* at 14). Thus, the Defendant's contention that Government Exhibits 10, 11, and 12 were not found on his computer is simply false. Exact copies of those three exhibits were found on the Defendant's computer during a browse conducted by Agent Waters. Thus, the exhibits were clearly authenticated prior to their admission and publication.

Furthermore, the three images were offered and admitted to show the Defendant's state of mind - knowledge, lack of mistake or other innocent reason, and intent (11/5/08, Tr. Trans., Vol. III at 61). This is a perfectly legitimate and recognized purpose for allowing the admission and publication of child pornography images. *United States v. Schene*, 543 F.3d 627, 643-44 (10th Cir. 2008); *United States v. Simpson*, 152 F.3d 1241, 1249 (10th Cir. 1998) (affirming the district court's decision to admit uncharged images of child pornography "to prove that (1) [the defendant's]

possession of child pornography on his computer was not a mistake or accident, and (2) he had knowledge of the nature of the material he was receiving").

In sum, there is simply no merit to the Defendant's claim that the trial court improperly allowed the jury to view the ten images of child pornography admitted during his trial. Thus, appellate counsel's decision not to raise this issue on appeal does not constitute constitutionally ineffective assistance of counsel.

8. Denial of Right to Fair Trial and Presumption of Innocence by Prosecutor When He "Confused the Issues and Wasted Time" (Ground One, Challenge VIII)

The Defendant next advances the rather novel argument that he was denied the presumption of innocence and right to a fair trial because the trial prosecutor was boring and unorganized. Defendant's Memorandum, at 55-68. The "prosecutor was boring and unorganized" argument was not raised at trial or on appeal so this issue must be analyzed by way of a *Strickland* ineffective assistance of counsel claim. By that standard, and in fact by any standard, the Defendant's claim that he was denied a fair trial and the presumption of innocence because the prosecutor presented "confusing, prejudicial, and irrelevant information" is laughable at best.

In making this argument, the Defendant points to segments of the government's case that he contends were irrelevant to the issue of whether he knowingly possessed child pornography. Specifically, he complains about testimony relating to how one would download and use the Limewire program. While the Defendant may contend this was irrelevant to the central issue in the

case - his knowing possession and attempted receipt of child pornography - it is apparent that the government was attempting to provide the jury with a thorough overview and understanding of the technology the Defendant used to obtain the child pornography found on his computer. As such, this testimony was clearly relevant and his attorneys cannot be faulted for not objecting at trial or on appeal to this overview.

The Defendant also complains about testimony elicited from Agent Huff about SHA1 values (*See* Defendant's Memorandum, at 61-64). While he describes this testimony as irrelevant and confusing, the concept of SHA1 values was key to understanding that Exhibits 10, 11 and 12 - the child pornography files that were part of the June 23, 2006, browse - were on the Defendant's computer.

The Defendant also points to testimony where the trial prosecutor stumbles and bumbles when he refers to the color coding on a government exhibit (*See* Defendant's Memorandum, at 65-68). Other than establishing that the trial prosecutor may sometimes be at a loss for words or a bit disorganized, there is really nothing presented by the Defendant in this "challenge" that would in any way, shape, or form indicate that his attorneys rendered ineffective assistance of counsel at trial or on appeal.

9. Improper Closing Argument (Ground One, Challenge IX)

In the last "challenge" under the heading of "Prosecutorial Misconduct," the Defendant claims:

> "My Fifth Amendment right to due process and my Sixth Amendment rights based on the presumption of innocence and right to fair trial by an IMPARTIAL jury were violated when [the prosecutor], in bad faith, misled and prejudiced the jury during his closing argument by outright lying about Ms. Loehrs testimony and then proffering his own testimony in order to rebut Ms. Loehrs."

Defendant's Memorandum, at 69 (emphasis in the original).

This issue was not raised on direct appeal so it may only be considered in light of an ineffective assistance of counsel claim, *United States v. Cook*, 997 F.2d at 1320. The Defendant has raised such a claim. In his memorandum in support of his § 2255 motion, the Defendant alleges his trial attorney was constitutionally deficient for failing to object "when [the prosecutor] repeatedly testified during closing argument in order to rebut the testimony of my expert witness, Ms. Loehrs. Mr. Smith also failed to object in closing argument to the repeated outright lies by [the prosecutor] concerning the testimony of my expert witness, Ms. Loehrs." Defendant's Memorandum, at 121. Although properly before the court, this claim must fail.

The Defendant is correct. The undersigned did misstate evidence during his closing argument. First, on at least three occasions during his closing, the prosecutor stated that Ms. Loehrs did not find any child pornography on the Defendant's hard drive - that was not correct. Ms. Loehrs stated she did not find "images" of child pornography, meaning still pictures, but she told the jury she did find digital video clips constituting child pornography. As the Defendant points out, the prosecutor mistakenly stated that Ms. Loehrs stated she did not find child pornography. Secondly, the prosecutor stated that Ms. Loehrs said the child pornography on the hard drive was not viewable.

That too was incorrect. Ms. Loehrs actually said she found no forensic evidence that the child pornography on the hard drive had ever been viewed - she did not assert that it was not "viewable."

The Ninth Circuit has held that, "since many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct." *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993), citing *Strickland*, 466 U.S. at 689. This is so because even if an objection is likely to be sustained, an attorney may make a strategic decision not to object. *See Johnston v. Love*, 940 F.Supp. 738, 754 (E.D. Pa.1996) (holding defense counsel's failure to object to the prosecutor's comments in closing argument was a matter of trial strategy and was not an instance of ineffective assistance of counsel). Regardless of the truth or falsity of the government's statements, Mr. Smith's decision not to object to the statement does not rise to a constitutionally deficient assistance of counsel. *United States v. Lively*, 817 F.Supp. 453, 466 (D.Del. 1993), aff'd, 14 F.3d 50 (3d Cir. 1993) ("Absent egregious misstatements by the prosecutor, the failure to object during closing argument and opening statement is within the wide range of permissible professional legal conduct, and thus does not constitute ineffective assistance of counsel."). Additionally, under Tenth Circuit precedent, a defense attorney's failure or reluctance to object when a prosecutor misstates the law or evidence during a closing argument, in and of itself, is not ineffective assistance of counsel. *Miller v. Mullin*, 354 F.3d 1288, 1299 (10th Cir. 2004).

But even assuming, *arguendo*, trial counsel's failure to object to the misstatements of the prosecutor constituted deficient performance, the Defendant simply has not, and cannot, establish "prejudice" under *Strickland, i.e.* but for trial counsel's failure to object to the improper statements of the prosecutor, there is a reasonable likelihood the outcome of the trial would be different. Given the facts of this case, such a showing simply cannot be made.

First, a showing of prejudice cannot be made because the trial court's jury instructions minimized the impact of the prosecutor's misstatements. *See*, *e.g., Thornburg v. Mullin*, 422 F.3d 1113, 1134 (10th Cir. 2005) (explaining that a judge's instructions that the jury "should consider only the evidence introduced at trial, that the attorneys' statements and arguments are not evidence, and that the jury bore the responsibility of determining the credibility of each witness" "may minimize the impact of a prosecutor's misstatements"). This is so because it is well established that "arguments of counsel generally carry less weight with a jury than do instructions from the court." *Boyde v. California*, 494 U.S. 370, 384 (1990). In the case at bar, the trial court repeatedly instructed the jury - on five separate occasions to be exact - that comments of counsel were not evidence (11/4/08, Tr. Trans., Vol. II at 3; 11/10/08, Tr. Trans., Vol. VI at 49, 51, 58, and 67.)[14]

[14] The last instruction on this subject is illustrative of the other four admonitions given by the court to the jury on the subject of comments and arguments of counsel not being evidence. The court, during its final charge to the jury, instructed the jury, "[i]f any reference by the Court or by counsel to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or not the statements of counsel." (11/10/08, Tr.Trans., Vol. VI, at 67).

Secondly, trial counsel's pointed out for the jury in his closing argument the mistakes contained in the prosecutor's argument. During his closing statement, defense counsel quite properly noted that the defense was not contesting the presence of child pornography on the Defendant's computer (11/10/08, Tr. Trans., Vol. VI at 28-48). He also noted the major difference between the testimony of Ms. Loehrs and the government's expert, Mr. Huff, was not whether the files were viewable, but rather whether the files had ever been viewed (*Id.*, at 29).

Finally, the government's evidence in this case was properly characterized as "strong" by the court of appeals. *United States v. Solon*, 596 F.3d at 1213. This simply was not a case where the Defendant's guilt was a close call. It certainly was not the type of case where the statements of an attorney in closing could be considered as influencing the outcome. (*See* argument below regarding sufficiency of evidence at II.C.2.d. at page 65).

The Defendant also complains that the prosecutor "testified" about certain matters during his closing. *See* Defendant's Memorandum, at 86, 87, and 89. However, in each instance cited by the Defendant, the remarks were fully supported by material within the record. During closing argument, a prosecutor may comment on facts in evidence and make reasonable inferences from such evidence. *United States v. Dazey,* 403 F.3d 1147, 1170 (10th Cir. 2005); *United States v. Ortega*, 69 F.3d 545 (9th Cir. 1995). In those instances where the Defendant contends the prosecutor was testifying, his arguments were actually accurate statements of the evidence and/or reasonable inferences from witness testimony.

On page 86 of his memorandum, the Defendant alleges that the prosecutor improperly "testified" when he discussed how IP addresses are the means by which computers utilizing the Internet recognize one another. Agent Balliett testified, "IP address stands for Internet protocol address, and it is how a computer connects to the Internet through their Internet service provider." She went on to say that an IP address is "similar to a phone -- a telephone number that, when you make a phone call, you have a phone number that you're coming from and you're trying to connect to somebody else (11/4/08, Tr. Trans., Vol. II at 17). Moreover, the Defendant's own expert, Ms. Loehrs, analogized an IP address to a street address (11/4/08, Tr. Trans., Vol. II at 21). Given this testimony, a statement that an IP address is how computers find one another is clearly a fair comment on the evidence.

On page 87 of his memorandum, the Defendant also alleges that the prosecutor improperly "testified" during his closing when he stated that it is not Limewire, but the files that Limewire introduces to a computer, that pose a danger. Again, Ms. Loehrs' testimony supports that notion. She told the jury that the "Zlob" trojan that she claimed infected the Defendant's computer "came in through Limewire. I don't know what it attaches itself to. It came in through the games on Limewire." (11/7/08, Tr. Trans, Vol. V, at 96).

The Defendant also claims that the prosecutor was offering testimony concerning the subject of open ports on the Defendant's computer. During his closing, the prosecutor stated that Ms. Loehrs did not give one specific example of an open port on the Defendant's computer that was open

and subject to attack. Defendant's Memorandum, at 89. Again, the testimony of Ms. Loehrs was that a particular port was "unassigned," which she found "odd." In fact, all Ms. Loehrs could offer the jury on the subject of open ports was conjecture and speculation - as exemplified by her last comment on the subject of ports during her direct testimony, "I don't have any explanation for that. I don't have an answer for that." (*Id.*, at 23). All Ms. Loehrs had to offer on the subject of port 43110 was pure, unadulterated speculation.

Finally, the Defendant argues that the prosecutor improperly testified concerning the AVAST anti-virus software that was present on the Defendant's computer. *See* Defendant's Memorandum, at 96-100. Again, the prosecutor's comments were based upon facts in evidence or were reasonable inferences based upon evidence within the record, including the following testimony of Agent Huff:

> (By Mr. Huff); There was indications that computer viruses had previously been on there that were found by the virus detection software that was present on that hard drive. I don't believe that there were any active viruses that I recall. I have a report that was generated from the virus detection software on that computer that reflects that more accurately.
>
> Q. (By Prosecutor) In regards to the viruses, was there virus protection software found on the computer?
>
> A. Yes.
>
> Q. And did that appear to be in working order?
>
> A. It did.
>
> Q. Did it appear to have been updated?
>
> A. It did.

> Q. Did it appear to be capable of functioning and, in fact, isolating viruses that might be introduced to the computer?
>
> A. Yes.
>
> Q. It appeared to be in working order?
>
> A. Appeared to be in working order.
>
> Q. Any question in your mind about that?
>
> A. No.

(11/5/08, Tr. Trans., Vol. III at 93). Mr. Huff went on to state, during cross examination:

> I found AVAST, which was the virus detection software which was present on that computer. I found the file logs pertaining to all the viruses that it had found, the routine checkups when the virus software went to the Internet to update itself at the AVAST website, and some of the scan logs pertaining to the AVAST that had scanned that hard drive for viruses. And I would have to look at the logs to get the exact dates and times, but I believe that that -- in my opinion, that computer was fairly clean of viruses, Trojans and worms.

Id., at 169.

Clearly, comments by the prosecutor that the anti-virus program was working properly were in line with the testimony of Agent Huff.

While the Defendant is correct that the prosecutor overstepped the bounds of proper argument by misstating the testimony of Ms. Loehrs regarding the presence of child pornography on the hard drive and its viewability - that does not entitle him to a new trial. In light of the record as a whole, and existing authority, it simply cannot be shown that his attorney was deficient because he did not object to those misstatements. Furthermore, even if defense counsel's performance

somehow fell outside the "broad range of reasonable professional competence," the Defendant has not established, and cannot establish, prejudice. This claim must be denied.

C. Ineffective Assistance of Counsel (Ground Two)

After raising nine "challenges" under the heading of "Prosecutorial Misconduct," the Defendant turns his attention to the failings of his trial and appellate attorneys. He claims that both his counsel were constitutionally deficient in their representation of him. However, as with his claims concerning "prosecutorial misconduct," the Defendant does not cite one case as authority for his positions. In fact, the Defendant offers very little by way of cogent analysis for his claims against his lawyers. The United States will address each of his claims *seriatim.*

1. Ineffective Assistance of Trial Counsel (Ground Two, Challenge I)

a) Failure to File Timely Motions - Tami Loehrs

The Defendant's first quarrel with the performance of his trial attorney relates to the employment of Ms. Loehrs. In his memorandum in support of his § 2255 claim he claims:

> [i]n summary, Ms. Loehrs testified she did do additional work after she arrived in Cheyenne for trial in November 2008. She did not testify to doing any work between March 27, 2008 and November 2008, even though she had previously testified that additional work needed to be done. There was plenty of time to do that additional work if Mr. Smith had requested authorization for additional funding. But because no request was submitted, no additional funding was authorized. Given that Mr. Smith ineffectively failed to file timely motions to request funding for an effective investigation, Ms. Loehrs was unable to complete her investigation, which was crucial to my defense.

Defendant's Memorandum, at 118.

Thus, the Defendant argues that since his attorney did not request additional funding for Ms. Loehrs, he was constitutionally ineffective. The Defendant is mistaken.

Detailed background is necessary to evaluate this claim.

When he was initially charged, the Defendant retained counsel (Messrs. Smith and Chapman) who, in turn, hired two experts to review the evidence gathered from the Defendant's hard drive (4/16/08, Mot. Hrg. at 4, 7). On January 3, 2008, some three months after he had pled guilty, the Defendant appeared before the district court and requested that his attorney be appointed to represent him at government expense. The court granted this request (1/3/08, Sent. Hrg. at 22-24). On January 22, 2008, the trial court entered an order allowing CJA funds to be expended for the services of one of the computer experts who had previously worked for the Defendant prior to his plea of guilty (Docs. 58, 59). Then, on February 21, 2008, the trial court entered another order, this time allowing defense counsel to retain a second expert, Ms. Tami Loehrs, to review the government's digital evidence. The order indicated that, for her services, Ms. Loehrs could bill $250 an hour but her total billing could not exceed $20,000 unless further ordered by the court (Docs. 63, 64).

Ms. Loehrs traveled from Tucson, Arizona, to Cheyenne, Wyoming, and spent March 12, 13, and 14, 2008, reviewing the government's evidence, for which she submitted a bill on March 20, 2008, for an "interim" payment totaling $10,603.90 (Doc. 69). On March 26, 2008, in response to the motion for an "interim" payment to Ms. Loehrs, the trial court, obviously concerned about the amount of the bill from Ms. Loehrs, entered an order paying her "interim" bill in full but struck its

initial total authorization of $20,000 for Ms. Loehrs' services. The trial court further ordered that "the Defendant and his attorneys shall henceforth obtain specific cost estimates of their charges, justifying with specificity the need therefore and the reasonableness of such charges before such charges are incurred . . ." (Doc. 70).

On April 1, 2008, in response to the court's order of March 26, 2008, the defense filed a document entitled "Ex Parte Notice to the Court Regarding Specific Cost Estimate For Expert Services" (Doc. 72). In that document, defense counsel asserted that Ms. Loehrs' evaluation of the evidence had been very helpful to the defense, she had stopped her work, and that the defense would be submitting additional bills from Ms. Loehrs (*Id*.). Two days after this communication, the Defendant filed a notice that he intended to withdraw his plea of guilty and proceed to trial (Doc. 73).

The court scheduled a hearing on the Defendant's motion to withdraw his plea for April 16, 2008. At that hearing, defense counsel informed the court that the Defendant's decision to withdraw his plea of guilty was almost entirely based upon the work of Ms. Loehrs (4/16/08, Mot. Hrg. at 8). Indeed, defense counsel stated, "I think now that we have a proper evaluation of the evidence, we're ready to go to trial" (*Id*. at 8) (emphasis added). Not once during the April 16, 2008, hearing did defense counsel inform the court that Ms. Loehrs needed additional time to conduct additional analysis of the hard drive. At the conclusion of the April 16th hearing, the trial judge stated:

> Well, while the Court has a duty to consider the expense to the United States which is, of course, paying the bill, and that's what I have been doing and yelping about

> Tami Loehrs' bill is because I think it is outrageously high, I also realize that Mr. Solon is entitled to a fair trial in which his defenses are adequately presented and that doesn't mean cheaply presented, necessarily, but I think we've got to have a handle on this and that's what I'm getting at. I will take the matter of withdrawal of the plea under advisement, and I will wait until I see what further data you get from this woman and including -- I want a specific estimate of what the additional costs are going to be for her coming here and testifying.

(4/16/08, Mot. Hrg. at 19-20).

Just prior to the April 16, 2008, hearing, the Defendant filed a document entitled "Ex Parte Notice to the Court Regarding Specific Cost Estimate for Expert Services." (Doc. 76). In that document, the defense informed the court that Ms. Loehrs had performed additional analysis after her trip to Wyoming, and that she was requesting an additional $5,375 in payment for those services (*Id.*). While the defense stated there was some uncertainty as to what, if any, additional work Ms. Loehrs might find necessary to perform prior to trial, the defense was requesting authorization for four hours of pre-trial consultation, ten hours of travel expenses to and from Cheyenne for trial, and eight hours a day trial time for the entirety of the Defendant's trial (*Id.*) (emphasis added).

The defense filed another document with the court on May 7, 2008, styled "Declaration of Tami Loehrs" (Doc. 84-2). In that document, Ms. Loehrs outlines the work she had done up to that time on the case. Nothing within that document suggests that Ms. Loehrs needed additional time to conduct her analysis. Indeed, if one examines paragraphs 31 through 35 of that declaration, there is simply nothing contained therein that would lead one to believe Ms. Loehrs needed any additional time to investigate. *Id.*

On September 17, 2008, Ms. Loehrs appeared before the court via video conference to discuss her fees and the additional work that she might have to perform to be prepared for trial. During that hearing, Ms. Loehrs testified as follows:

> Q. (By defense counsel): And do you have an estimate as to approximately how much time you would need to complete this case with the Court advising us that trial is set for early November?
>
> A. (By Ms. Loehrs): Again, it depends on the issues that we go to look for. These exams -- I can never do all the work that needs to be done on these exams. I try to cut it down to the issues that we're dealing with. If the work I've done thus far is all we need to go to trial, and I'm sure that there will be other questions that I will need to answer, I -- you know, ten hours, maybe. It entirely depends.
>
> Q. Miss Loehrs, you and I have discussed the possibility of remote access of Mr. Solon's computer; is that correct?
>
> A. That's correct.
>
> Q. For you to do a complete and full analysis to determine if someone had remotely accessed Mr. Solon's computer, do you have an estimate of the time that would be needed to do a full analysis?
>
> A. It depends on what I find. There -- there are log files that I would need to search through, again, data on the computer. I may find that remote -- that evidence of that remote access in two hours. I may go through thousands and thousands of computer files for two weeks and not find it. So, again, I'm not trying to be evasive, but analyzing computer data can be extremely long, tedious work. So, you know, if I'm given five hours to go in there and do that, I'll go in and find what I can. I may not have the answer. Could I spend another five hours and keep looking? Absolutely. But sometimes we have to cut our losses. So, again, whatever time we're given, I would go in and look for that data. I may find it in five hours. I may not.

> THE COURT: Mr. Smith, is this a stopping point?
>
> DEFENSE COUNSEL: Yes, Your Honor, I think I'm through as to her.

(9/17/08, Mot. Hrg. at 50-52) (emphasis added).

Again, nothing in this testimony would suggest that "hundreds" of hours were needed by Ms. Loehrs to be ready for trial. Rather, Ms. Loehrs stated, under oath, "ten hours, maybe." *Id.*

On September 23, 2008, the court entered an order concerning the payment of fees to Ms. Loehrs. The court authorized the pretrial preparation time requested by the defense and stated that it would pay for Ms. Loehrs to attend and assist the defense at trial, but at a reduced rate (Doc. 96). The defense followed up this order by submitting a document entitled "Filing of Affidavit Pursuant to Court's Order Ruling On Outstanding Motion and Request for Approval for Hourly Rate" on October 14, 2008 (Doc. 106). In this filing, Ms. Loehrs agreed to provide all future services at $150 an hour. The filing also requested that, in addition to the previously authorized four hours for pre-trial preparation, the court authorize up to an additional four hours each day of trial "only if necessary and documented" for Ms. Loehrs to review evidence and consult with counsel (*Id*.). The court granted this request (Doc. 111). Thus, just twenty days before trial was set to commence, Ms. Loehrs was satisfied that she could fulfill her duties if authorized to participate in four hours of pretrial preparation and an additional four hours a day above and beyond trial time. This was clearly in line with her sworn testimony of September 17, 2008. There was absolutely

nothing within the October 14, 2008, filing, which included an affidavit from Ms. Loehrs, that suggested she needed a hundred or more hours to complete her analysis of the evidence in this case.

At no time did the Defendant object to any of the orders issued by the court relating to the payment of fees to Ms. Loehrs, or to the requirement imposed by the court that any additional analysis undertaken by Loehrs be supported by "specific cost estimates of their charges, justifying with specificity the need therefore and the reasonableness of such charges before such charges are incurred" (Doc. 70). It was not until the fourth day of trial that the claim was made by Ms. Loehrs that she needed more time to complete her work. During defense counsel's direct examination of her, in response to a question about her report, Ms. Loehrs stated, "When I got back to my lab to continue my work, I kind of—my work got stopped, so I did a report on what I had done to that point. So it was—it is a preliminary report because it is what I found up to this point, but I did not get to continue my exam in its entirety" (11/6/08, Tr. Trans., Vol. IV at 160).

The next day, after an exchange regarding an anti-virus warning log on the Defendant's hard drive, the following occurred between defense counsel and Ms. Loehrs:

> Q. (By defense counsel): All right. Have you looked at other logs to know or other scans to know if there were viruses present?
>
> A. (By Loehrs): Actually, this is about the point in my exam where I was stopped.

(11/7/08, Tr. Trans., Vol. V at 40).

At this point, the United States objected and requested a sidebar (*Id*. at 40). After the sidebar, the court instructed the jury to disregard Ms. Loehrs' statement about being stopped (*Id*. at 42).

During her testimony, Ms. Loehrs offered speculation that the Defendant's computer was compromised by a virus or trojan which might explain the presence of the child pornography the agents found on the computer. On cross-examination, when asked to specify which virus she was claiming infected the Defendant's computer, Ms. Loerhs stated, "I haven't gotten to investigate" (*Id*. at 96). This statement is a direct contradiction of her sworn affidavit of May 7, 2008,, paragraph 31, wherein she stated:

> Additionally, the virus scan of the computer evidence found several instances of viruses and Trojans. Because these items are of particular importance to the defense in determining whether or not the system was compromised by outside users, I spent a great deal of time examining files to determine if any remote access occurred on the defendant's computer. Because viruses and Trojans are often designed to cover their tracks and hide any evidence of their existence, uncovering these intrusions can be time consuming and often result in nothing of evidentiary value.

(Doc. 84-2, at 6).

Later in cross-examination, when asked if a virus has ever resulted in the "mysterious download of child pornography," Ms. Loehrs lamented, "Once again, I have not finished my investigation" (*Id*. at 96–97). Still later on cross-examination, Ms. Loehrs finally gave some testimony of how much time she claimed she needed to finish her exam and prove her theory of the case: "And give me about a hundred more hours and I may be able to prove it . . . ." (*Id*. at 98) (emphasis added). However, at the close of her testimony, Ms. Loehrs also opined that she might

need more than one hundred more hours for her analysis when she stated, "I would say I would put in probably several hundred more hours on this case to get to the bottom of what really happened, but at this point I can't put anyone at this keyboard for these files" (*Id*. at 61).[15]

In his appeal to the Tenth Circuit, the Defendant alleged the trial court abused its discretion in not granting additional funding so that Ms. Loehrs might continue to work on his case. The Tenth Circuit rejected this argument, specifically finding this court granted all of the funding requests made by the Defendant. *United States v. Solon*, 596 F.3d at 1210. Thus, there was no abuse of discretion on the part of the trial court or violation of the Defendant's due process rights. *Id.*

The Defendant now argues that his attorney should have filed additional requests or motions for additional funding for Ms. Loehrs. However, the government would point out that it was not until the trial was almost over that Ms. Loehrs announced she might need "hundreds" of hours of additional time to work on this case. As noted above, on September 17, 2008, some six weeks before the start of trial, Ms. Loehrs stated that she might need five to ten hours of additional time to analyze the computer (9/17/08, Mot. Hrg. at 50-52). Then, three weeks later, in the October 14, 2008, defense filing asking for funding for Ms. Loehrs, there was absolutely nothing to suggest that she might need a hundred or more hours to continue her analysis of the evidence in this case.

Given the sworn statements made by Ms. Loehrs prior to trial, there is nothing to suggest that she ever conveyed to trial counsel, or anyone else for that matter, that she needed a hundred or more

[15]All told, district court authorized total payments to Ms. Loehrs in the amount of $22,880.84 (docket entries 5/19/08 and 1/30/09).

hours to complete her work in this case. The record simply does not bear out the notion that trial counsel somehow ignored any requests of Ms. Loehrs to obtain authorization for additional work or funding. It was only during her trial testimony, when asked about things she did not do during her analysis that Ms. Loehrs came up with the claim that she needed a hundred or more additional hours to work on the case.

As the Tenth Circuit noted in its opinion affirming the Defendant's conviction, "[a]n indigent defendant is not entitled to all the assistance that a wealthier counterpart might buy, but rather only the basic and integral tools." *United States v. Solon*, 596 F.3d at 1210, quoting *United States v. Kennedy*, 64 F.3d 1465, 1473 (10th Cir. 1995). Here, through the efforts of his attorneys, the Defendant was afforded the basic and integral tools necessary to mounting a defense. Trial counsel sought and employed not one, but, all told, three computer experts on behalf of the Defendant. He obtained CJA funds for those experts to examine the government's evidence. Two of those experts testified on behalf of the Defendant at trial. Given the record in this case, the Defendant has not established that his trial attorney rendered constitutionally deficient assistance in regards to his employment of Ms. Loehrs.

Additionally, even if trial counsel's performance in regards to his employment of Ms. Loehrs somehow fell below that "broad range of reasonable professional competence" required by *Strickland*, the Defendant cannot in any event establish prejudice. As noted above, Ms. Loehrs testified, "And give me about a hundred more hours and I may be able to prove it . . . ." (11/7/2008,

Tr.Trans., Vol. V at 98) (The "it" being that the child pornography on the Defendant's computer was placed there by someone other than the Defendant). This is rank speculation, and speculation, without much, much more, is not sufficient to establish prejudice under *Strickland*. *See, United States v. Boone*, 62 F.3d 323, 327 (10th Cir. 1995).[16]

This claim must be denied.

b) Failure to Retain Services of Other Experts

The Defendant next argues that his trial attorney was ineffective in not employing at least three additional experts to testify on his behalf. According to the Defendant, trial counsel should have located and employed: 1) an expert in computer malware such as Trojans; 2) an expert to give a live, in-court demonstration that would establish that a Trojan existed on his computer system; and 3) an expert in child pornography who would testify as to the characteristics of those who collect child pornography. *See* Defendant's Memorandum, at 119-120.[17]

As noted immediately above, the law regarding the employment of experts for an indigent defendant was set out in the Tenth Circuit opinion affirming the Defendant's conviction and bears repeating: "An indigent defendant is not entitled to all the assistance that a wealthier counterpart might buy, but rather only the basic and integral tools." *United States v. Solon*, 596 F.3d at 1210,

[16] The Defendant ignores the obvious - give Ms. Loehrs enough time and she may very well disprove his claims that a third party hacker placed the child pornography on his computer.

[17] One would hope that the Defendant's wish list could be shortened to just two experts as it would seem logical that the same expert could describe the virus and give an in-court demonstration of the operation of the virus.

quoting *United States v. Kennedy*, 64 F.3d 1465, 1473 (10th Cir. 1995). In the context of an ineffective assistance of counsel claim, the Tenth Circuit has stated that trial counsel's decision regarding whether to present expert testimony is a strategic decision. *See*, *United States v. Maxwell*, 966 F.2d 545, 548-49 (10th Cir. 1992). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland v. Washington*, 466 U.S. at 690. "Whether to raise a particular defense is one aspect of trial strategy, and informed strategic or tactical decisions on the part of counsel are presumed correct, unless they were completely unreasonable, not merely wrong." *Anderson v. Attorney General of Kansas*, 425 F.3d at 859.

Here, through the prism of hindsight, the Defendant, relying on nothing but the pure conjecture of Ms. Loehrs, offers nothing more than general declarations that his attorney should have hired more experts like her. *See* Defendant's Memorandum, at 118-19. He does not identify any particular expert. And while he does give us a very broad indication of what testimony he would hope each expert might give, there is simply nothing in his papers to suggest that such experts exist or that they would testify as the Defendant proposes. Whether trial counsel should have - or could have - retained the experts suggested by the Defendant is speculative at best. This argument falls into the category of merely second-guessing a defense strategy. As such, this contention is wholly lacking in merit.

c) Failure to Object to the Trial Judge's Leaving the Court

The Defendant next claims that his attorney was constitutionally ineffective for not objecting when the trial judge left the courtroom during closing arguments. Defendant's Memorandum, at 120. The merits of this issue was raised on direct appeal - that structural error occurred when the judge left the courtroom. However, the Tenth Circuit rejected the notion that this error was structural and held that plain error did not occur. *United States v. Solon*, 586 F.3d at 1212-13. Specifically, the court stated that the Defendant simply could not show that but for the complained of error - the judge leaving the courtroom during closing argument - the outcome of the trial would have been different. In that regard the court stated:

> Additionally, the government's case was strong. [The Defendant's] computer was observed online offering child pornography for download on June 23 and August 9, 10, and 11, 2006. A search of [the Defendant's] computer's hard drive revealed that on September 20, 2006, forty-six files with names consistent with child pornography were downloaded using Limewire, a peer-to-peer file sharing program. Furthermore, [the Defendant] admitted to using Limewire on September 20 to attempt to download two computer games. Additionally, the government presented evidence that [the Defendant] was playing online poker on his computer less than five minutes before the child pornography files were downloaded. In light of the brevity of the judge's absence as well as the strength of the government's case, Mr. Solon has not established a reasonable probability that, but for the judge's absence, the jury would not have convicted him.

Id., at 1213.

It is axiomatic that issues once litigated and resolved on direct appeal may not be re-litigated in a § 2255 proceeding, at least absent some intervening and significant change in the circuit's law on the issue. *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994). Because the court of

appeals has already considered and rejected this claim on direct appeal and because the Defendant has not identified any intervening change in the law that would have resulted in a different and more favorable disposition of the matter, this claim must be rejected.

d) Failure to Object to Prosecutorial Misconduct

The Defendant next claims that his attorney rendered ineffective assistance of counsel for not keeping the "focus of the trial on the main issue in question: Did I knowingly possess and receive child pornography?" The Defendant then links this argument to his trial counsel's failure to counter what he contends was the prosecutorial misconduct he outlined in Ground One, Challenges I through IX.

Since the government has responded to each of those "challenges" above, it will not reiterate those arguments here. Suffice it to say that the Defendant's pleading fails to adequately explain how his attorney was deficient or what prejudice he suffered thereby.

This contention must fail.

e) Failure to Object to the Data from Hard Drive Due to the Alleged Absence of Write Block Device During Forensic Exam

The Defendant next alleges that his trial attorney:

> "had a copy of Agent Balliett's report that listed the 'Details of Investigation.' That report stated that Agents Balliett and Huff forensically examined the hard drive without the protection of write-block device, thereby destroying the integrity of that evidence. Agent Huff again testified to that fact during trial and still Mr. Smith didn't challenge anything that was supposedly produced from that hard drive."

Defendant's Memorandum, at 121.

The Defendant offers absolutely nothing by way of cogent argument or authority to support this claim. Because of his failure in pleading, the claim should be denied. *United States v. Fisher*, 38 F.3d at 1147. Additionally, the claim should be denied because it is factually inaccurate.

Agents Balliett and Huff followed proper forensic procedure in seizing, transporting, and examining the Defendant's hard drive (please see the attached affidavit of Special Agent Nicole Balliett, marked "Attachment A," affixed hereto, and by this reference incorporated herein). The Defendant's allegation that Agent Huff mishandled the Maxtor hard drive is simply without any factual basis whatsoever.

This claim is wholly without merit.

f) Failure to Object When Hard Drive Was Not Introduced as Evidence

The Defendant also claims his attorney rendered ineffective assistance of counsel when he "didn't challenge the fact that the hard drive itself was not introduced as evidence." Defendant's Memorandum, at 121. The Defendant offers us no analysis or authority for this position. For that reason alone this claim must be denied. *Reedy v. Werholtz,* 660 F.3d 1270, 1275 (10th Cir. 2011) (declining to address a procedural-due-process argument where it was not adequately briefed); *United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994).

Additionally, the United States previously addressed the merits of this issue in this response at II.B.5. - found at page 22 of this response.

2. Ineffective Assistance of Appellate Counsel (Ground Two, Challenge II)

The Defendant next alleges his appellate attorney was constitutionally deficient in her representation of him. In his memorandum he declares, "[m]y Sixth Amendment right to the effective assistance of counsel and my Fifth Amendment right to due process were violated when [appellate counsel] failed to raise certain issues, including issues that had been preserved for appeal by my trial attorney . . ." Defendant's Memorandum, at 122. As with other arguments he raises throughout his motion and supporting papers, the Defendant sets out this claim in a conclusory fashion and offers no real analysis of the alleged ineffectiveness of appellate counsel or explains how he was prejudiced per *Strickland*. For this reason alone the challenges in this section should be denied. *United States v. Fisher*, 38 F.3d at 1147.

The government has previously set forth the standard of review for claims relating to the ineffective assistance of counsel. See above, II.B.7. found at pages 26-27. With these principles in mind we turn to the merits of the claims found in the Defendant's Memorandum, marked Ground Two, Challenge II.

a) Failure to Argue Prosecutorial Misconduct and the Ineffectiveness of Trial Counsel

The Defendant first alleges that appellate counsel "did not include the issue of prosecutorial misconduct in the appeal because it was not addressed in the trial phase. [Appellate counsel] was ineffective in not recognizing the ineffectiveness of my trial attorney . . . , and therefore did not include the issues of ineffectiveness of counsel and prosecutorial misconduct in the appeal."

Defendant's Memorandum, at 122. Again, the Defendant cites to absolutely no legal authority in support of his arguments. Even though the United States has responded to each of the Defendant's contentions concerning prosecutorial misconduct, these allegations should be dismissed for the conclusory fashion in which they were made. *United States v. Fisher*, 38 F.3d at 1147.

Since the government has responded to each of the allegations of prosecutorial misconduct above, it will not do so again here.

The Defendant's allegation that appellate counsel was also ineffective because she failed to advance an ineffective assistance of trial counsel argument in the direct appeal is without merit. Had appellate counsel included such an argument within her brief, it would have been rejected out of hand by the Tenth Circuit. This is so because, "[i]neffective assistance of counsel claims should be brought in collateral proceedings, not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed." *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995). The Defendant offers nothing to counter this rule of law.

Both prongs of this claim (challenge) are wholly lacking in merit and must be denied.

b) Failure to Seize His Entire Computer System

The Defendant next contends that appellate counsel was ineffective when she failed to raise the issue of the non-seizure of the entire computer system. Defendant's Memorandum, at 123-24. In support of this contention, in his memorandum the Defendant refers us to a written page from a motion to dismiss filed by his trial counsel that relates to this subject. He then states, "it was

testified to by both sides that the entire computer system is essential to analyze the evidence. [Appellate counsel's] decision to limit the issues included in an appeal was ineffective when she failed to include this very important issue of the entire computer system not being seized." *Id.*, at 123. He also raises this very issue under the heading of "Search and Seizure" in Ground Three of his memorandum. *See* Defendant's Memorandum, at 128-146. A review of that section reveals that the Defendant has inserted numerous excerpts from the trial transcript and from the Department of Justice publication entitled "Use of Computers in the Sexual Exploitation of Children." At the end of the section he states:

> In Bad Faith, the agents who conducted the search of my home and computer violated my right to be secure against unreasonable searches and seizures when they failed to seize the evidence listed in the Application and Affidavit for Search Warrant. Amendment IV.
>
> And, I have been deprived of life, liberty and property, without due process of law because The Government, in Bad Faith, has placed me in a category defined simply as those deserving "this particular type of investigation." That translates to: "The suspect does not deserve the right to defend himself." Amendment V.

Id., at 146.

This is all the Defendant offers on this issue. There is nothing by way of analysis or an attempt to reconcile this claim with the existing case law within the circuit. It is an understatement to describe his assertions as conclusory. Thus, this claim may be denied on that ground alone. *United States v. Fisher*, 38 F.3d at 1147.

Assuming, *arguendo*, that the Defendant has properly presented this argument, it must fail on its merits, or more properly due to lack of merit.

On April 13, 2007, the Defendant's attorneys filed a motion to dismiss based upon the failure of the agents to seize the entire computer system (Doc. 16). Essentially, the Defendant argued that the failure of the agents to seize the entire system constituted a due process violation based upon the holding of *California v. Trombetta*, 467 U.S. 479 (1984). The government filed a response to the motion and on May 30, 2007, the court held a hearing on the motion (Docs. 17, 22). After considering the proffers and argument of counsel, the court denied the Defendant's motion, holding as follows:

> Defendant urges the court to dismiss the indictment under *California v. Trombetta*, 467 U.S. 479 (1984), because the Government improperly destroyed evidence, denying him due process. The Court finds, however, that the Defendant's argument is unpersuasive. The Court is not persuaded the because the Defendant fails to point to any evidence that the Government has destroyed. During the hearing, Defendant's counsel admitted he could not actually state there had been any destruction of evidence. *Trombetta* is accordingly not applicable to the facts as presented by the Defendant.
>
> In this case, Defendant merely speculates that the parts of the computer system which the agents did not seize may have been altered since the seizure of the hard drive. The Court, however, does not equate possible alterations by the Defendant or his family to a destruction of evidence by the Government. To the extent the Defendant wishes to challenge the integrity of the entire computer system, he must do so at trial. The integrity of the system and the Defendant's ability to view the alleged images will be questions for the jury. The motion to dismiss should consequently be denied.

(Doc. 23, at 2-3).

If appellate counsel had attempted to challenge this ruling on appeal, she would have had to establish that this court committed clear error in holding the government did not destroy potentially exculpatory evidence. *See United States v. Bohl*, 25 F.3d 904, 909 (10th Cir. 1994). Clear error exists only if a finding is "without factual support in the record" or the court is "left with a definite and firm conviction that a mistake has been made." *United States v. Maestas*, 642 F.3d 1315, 1319 (10th Cir. 2011). "Pointing to conflicting evidence inconsistent with the district court's finding is insufficient, standing alone, to establish clear error, for every trial is replete with conflicting evidence." *Penncro Assocs., Inc. v. Sprint Spectrum, L.P.*, 499 F.3d 1151, 1161-62 (10th Cir. 2007). An appeal of this court's order denying the motion to dismiss could not have satisfied this demanding standard.

In *California v. Trombetta*, 467 U.S. 479, 485 (1984), the Supreme Court held that to the extent the Constitution imposes a duty on the government to preserve evidence, "that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense"–*i.e.*, evidence that is constitutionally material. To be constitutionally material under *Trombetta*, the evidence must (1) "possess an exculpatory value that was apparent [to the police] before the evidence was destroyed," and (2) "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id*. at 489. *See also United States v. Hood*, 615 F.3d 1293, 1299 (10th Cir. 2010); *United States v. Parker*, 72 F.3d 1444, 1451 (10th Cir. 1995).

If the exculpatory value of the missing evidence is indeterminate or only "potentially useful," then the defendant must also show that the government acted in "bad faith" in destroying the evidence. *See Arizona v. Youngblood*, 488 U.S. 51, 56 (1988). "[M]ere negligence on the government's part in failing to preserve such evidence is inadequate for a showing of bad faith." *Id*. at 912. *See Bohl*, 25 F.3d at 912; *see also Montgomery v. Greer*, 956 F.2d 677, 681 (7th Cir.) (accidental loss of photographs "unprofessional" and negligent, but "mere negligence, without more, does not amount to a constitutional violation").

Here, as the trial court properly found, the government destroyed nothing. Further, it is pure speculation to opine that any evidence of exculpatory value was destroyed because the entire computer system was not seized. During the trial in this matter, Agent Huff was asked why he did not seize the entire system. He testified:

> Q. (By Prosecutor): I will put that question to you. Why not take the whole computer system?
>
> A. (Mr. Huff) From my examination on scene I felt that I had enough observation to know that that system was working. I had seen the screen in action. It worked. The mouse worked. The keyboards worked. I shut it down. As it booted up it went through its own self test, so it performed a test on itself, basically, to show that all the hardware attached to it worked. It could find the graphics card, the monitor, all of that type of information, the hardware components. I knew the system worked. I installed my own software on it. I was able to get to the hard drive and look at files. So I knew that the hard drive was active and it worked also. I retrieved files that – at least one file, the Limewire Property file, from there that led me to believe the information that I needed for this particular case resided on the hard drive of that computer.

> Q. Did you believe that there was anything of forensic value that would have been gained by taking the entire system, the monitor, the computer tower with all of its various component parts, the keyboard and the mouse?
>
> A. For this particular type of investigation I didn't see the need to take any of those other components.
>
> Q. And since that point in time, since September 20th of 2006, has there anything come to light that has made you change your opinion in that regard?
>
> A. No.

(11/5/08, Tr.Trans., Vol. III at 83-84). This does not constitute bad faith.

Given the state of the record in this case, and applying the relevant law, there is simply no basis to assert that the trial court committed clear error when it ruled that the government did not destroy potentially exculpatory evidence. Further, there is nothing in the record that Agent Huff acted in bad faith when he decided not to seize the Defendant's computer system. Thus, Defendant's appellate attorney was not deficient in not raising this issue on appeal.

In addition to being couched in a wholly conclusory fashion, this claim lacks merit.

c) Failure to Argue Child Pornography Should Not Have Been Admitted Into Evidence

The next complaint the Defendant levels at his appellate attorney concerns her failure to argue on appeal that the trial court committed error when it admitted into evidence the images of child pornography found on the Defendant's hard drive. *See* Defendant's Memorandum, at 124. In reference to this issue, the Defendant's memorandum states:

> A Motion in Limine to Preclude Government from Showing Child Pornography to Jury was filed June 11, 2008. In this motion it was argued "that unless and until the Government presents evidence that this Defendant viewed or copied the five videos or previews ofthe videos, (thereby showing dominion or control, or other indicia of knowing possession) that the videos not be shown to the jury."
>
> In an Order Ruling on Outstanding Motions filed September 23, 2008, Defendant's Motion in Limine to Preclude Government from Showing Child Pornography to the Jury was denied. When [appellate counsel] limited the issues included in the appeal, she ineffectively decided not to raise this very important issue of not showing child pornography to the jury until it could be proven I viewed, copied, or otherwise knowingly possessed it.

Id.

These two paragraphs are hardly sufficient to establish a cognizable ineffective assistance of appellate counsel claim. However, that is not all the Defendant had to say about this issue. He repeats this claim in that section of his motion and memorandum he entitles "Indictments." In Ground 5, Challenge II, the Defendant asserts:

> I challenge my conviction based upon the files shown to the jury on November 5, 2008. The "evidence" was alleged to have been on my computer on June 23, 2006 and September 20, 2006. However, there was no evidence whatsoever that any of these files had ever been viewed. In addition, none of these files were played from my hard drive and even if they had been played from my hard drive, that hard drive had already been compromised when Agent Huff conducted a forensic exam on the hard drive without the protection of a writeblock device.

Defendant's Memorandum, at 179.

Then, as he does throughout his memorandum, he cuts and pastes trial testimony that he believes establishes some evidentiary point. However, setting forth trial testimony does not equate

to a lucid, understandable analysis and argument. Rather, the conclusory fashion in which he states his contentions should result in the denial of this claim. *United States v. Fisher,* 38 F.3d at 1147.

The United States addressed the merits of this claim above at II.B.7. beginning at page 25. Since the government has already responded to the allegation of ineffective assistance of appellate counsel raised in this "challenge," it will not do so again here.

This claim must be denied.

d) Failure to Argue There Was Insufficient Evidence to Convict

In his third contention relating to the ineffectiveness of appellate counsel, the Defendant argues that a sufficiency of evidence argument should have been included within his direct appeal. Defendant's Memorandum, at 126. The Defendant also advances a sufficiency of evidence argument in Ground Five, Challenge I. *See* Defendant's Memorandum, at 166-179. By way of argument regarding this claim, he includes the transcript of the Rule 29 motion for judgment of acquittal made by his trial attorney at the close of the government's case-in-chief. *Id.*, at 125. However, he fails to develop any additional argument or offer any analysis as to why his attorney should have included this argument within the direct appeal. Given the existing precedent in this circuit - that "appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal" *Smith v. Robbins*, 528 U.S. 259, 288 (2000) - the Defendant's lack of analysis on this issue requires the court to dismiss this claim. *United States v. Fisher*, 38 F.3d at 1147.

The Defendant's argument in Ground Five, "Indictments," Challenge I is also defective. *See* Defendant's Memorandum, at 166-179. In this section of his memorandum he rehashes much of the trial evidence in a light most favorable to him. *Id.* However, he does not attempt to demonstrate how a sufficiency of the evidence argument would have been successful under the proper standard of review that the Tenth Circuit would apply. This is simply not sufficient, and the claim should be denied on this ground. *United States v. Fisher*, 38 F.3d at 1147.

Assuming that the Defendant's pleading is sufficient to pass muster under *Fisher,* it must in any event be denied on its merit as there was ample evidence within the record to sustain the jury's verdict. According to the Tenth Circuit, whether evidence at trial is sufficient to prove beyond a reasonable doubt a defendant's guilt is a question of law which the court reviews *de novo*. *United States v. Wardell*, 591 F.3d 1279, 1286-87 (10th Cir. 2009). In conducting that review, the court will "consider both direct and circumstantial evidence, and all reasonable inferences therefrom, in the light most favorable to the government." *Id*. at 1287 (quoting *United States v. Weidner*, 437 F.3d 1023, 1032 (10th Cir. 2006) (emphasis added)). On review, the court "may not disturb the jury's credibility determination, nor weigh the evidence" in performing this analysis. *Id*. (citing *United States v. Waldroop*, 431 F.3d 736, 742 (10th Cir. 2005)). The evidence is sufficient under these tests if a rational jury could have found the defendant guilty beyond a reasonable doubt. *Id*. at 1286-87 (citing *United States v. Willis*, 476 F.3d 1121, 1124 (10th Cir. 2007)).

The Tenth Circuit recently held that for possession of child pornography to be "knowing," a defendant must know the charged images exist. *United States v. Haymond*, __ F.3d __, 2012 WL 698376, *5 (10th Cir. 3/6/12). The *Haymond* court went on to note, "in the analogous context of knowing receipt of child pornography, defendants cannot be convicted for having the ability to control something that they do not even know exists.'" *Id.*, citing *United States v. Dobbs*, 629 F.3d 1199, 1207 (10th Cir. 2011). In other words, a defendant's control or ability to control "need[s] to relate to images that the defendant knew existed; otherwise, the defendant's conduct with respect to the images could not be deemed to be knowing." *Id*. "To convict [a defendant], the government was required to prove he knew of and also controlled (or at least had the ability to access and control) the particular images that formed the basis of the conviction." *Id.*

Here, the government's evidence met the requirements set out in *Haymond*. As noted throughout this response, the Tenth Circuit described the government's evidence as "strong." *United States v. Solon*, 596 F.3d 1213. In summarizing that "strong" evidence, the court noted:

> . . . the government's case was strong. Mr. Solon's computer was observed online offering child pornography for download on June 23 and August 9, 10, and 11, 2006. A search of Mr. Solon's computer's hard drive revealed that on September 20, 2006, forty-six files with names consistent with child pornography were downloaded using Limewire, a peer-to-peer file sharing program. Furthermore, Mr. Solon admitted to using Limewire on September 20 to attempt to download two computer games. Additionally, the government presented evidence that Mr. Solon was playing online poker on his computer less than five minutes before the child pornography files were downloaded.

Id. (emphasis supplied).

In addition to the above, the evidence, viewed in a light most favorable to the government, established that the Defendant used his computer to view files with names consistent with child pornography in June, July, August, and September of 2006 (*see* Government Exhibit 32, copy attached, marked Attachment B; *also see* testimony of Agent Huff, 11/5/08, Tr.Trans., Vol. III, at 153-155). The government also introduced a time line of the downloads that occurred on September 20, 2006 (*see* Government Exhibit 31A, attached hereto and marked Attachment C). This exhibit clearly established that the Defendant downloaded and previewed child pornography files on September 20, 2006.

At trial the Defendant contended that he was not responsible for the child pornography found on his computer. His theory of defense was that his computer was vulnerable to attack and that some type of malware had allowed a third party - a hacker - to place the child pornography on his computer.[18] However, the government's expert, Agent Huff, testified that the Defendant's computer was equipped with anti-virus software that was working properly. According to Huff, there were no active viruses on the computer and the malware identified by Ms. Loehrs had been identified and deleted by the anti-virus software (11/5/08, Tr. Trans., Vol. III at 93, 121, 162, 169-72).

Given the strength of the evidence the government produced at trial, there was more than sufficient evidence for a rational jury to find the Defendant guilty beyond a reasonable doubt. There

[18] Indeed, in the section of his memorandum entitled "Indictments," the Defendant insists the evidence revealed his computer was "infested" with viruses. *See* Defendant's Motion, at 22, and Memorandum, at 90).

is no merit to the claim that the Defendant's appellate attorney was ineffective for not including a sufficiency of the evidence claim in his direct appeal.

d) Failure to Argue that Exhibits 10, 11, and 12 Should Not Have Been into Evidence

The Defendant next argues that his appellate attorney should have appealed the trial court's decision to admit Government's Exhibits 10, 11, and 12 - the images from the June 23, 2006, browse. Defendant's Memorandum, at 126-27. He also raised this issue in his section on Prosecutorial Misconduct, at Ground One, Challenge VII, and in Ground Six, captioned "Jury Prejudice." However, as occurs throughout his motion and memorandum, the Defendant simply fails to provide us with anything other than excerpts of testimony and conclusory statements as to why he believes his attorney was deficient. He offers nothing by way of analysis or cogent argument. For this reason alone the claim should be dismissed.

The government addressed this issue on the merits at II.B.7., found at page 25 above and will not repeat that argument here.

This claim must be denied.

D. Search and Seizure (Ground Three)

In his § 2255 motion the Defendant states, "I challenge my conviction in USA v. SOLON based upon violation of my Constitutional rights outlined in AMENDMENTS IV and V when Special Agents Balliett and Huff, in BAD FAITH, failed to seize the preponderance of the evidence." Defendant's Motion, at 16. This rather indecipherable claim becomes a bit more understandable

once one consults the Defendant's supporting memorandum. *See* Defendant's Memorandum, at 128-146. Clearly, the gist of the Defendant's argument is that the investigating agents should have seized his entire computer system. However, while the Defendant points to a United States Department of Justice Handbook entitled "Use of Computers in the Sexual Exploitation of Children," December 2006, edition, that encourages investigators to seize "the entire computer system to replicate the suspect's use of it and to analyze that use," he does little else to show us why the seizure of the entire computer system would have resulted in his acquittal other than offer speculation.

Because the Defendant did not raise this issue on direct appeal, it may only be considered by way of a *Strickland* ineffective assistance of counsel claim. That argument was addressed above at II.C.2.b. at 59 and will not be repeated here.

The Defendant is not entitled to any relief based upon the argument he sets forth in this "Ground."

E. Lost and Destroyed Evidence (Ground Four)

In the next section of the Defendant's motion and memorandum, which is designated Ground Four, he complains about "Lost and Missing Evidence." Defendant's Memorandum, at 147-165. This group of four claims (challenges) all relate to what the Defendant perceives to be mistakes made by the investigators in handling evidence during the investigation of this matter. They will be addressed in the order presented.

1. Alleged Mishandling of Hard Drive (Ground Four, Challenge I)

In his first "challenge" the Defendant states, "I challenge my conviction on the mishandling of my hard drive, in BAD FAITH, from the time it left my home in the custody of SA Randall Huff, and particularly, the mishandling of the hard drive upon its arrival at the ICAC office in Cheyenne. Any reliable information that the hard drive could have held was lost and destroyed in the transition from my home to the "secure" location in Cheyenne." Defendant's Memorandum, at 146. Essentially, the Defendant erroneously suggests that on September 22, 2006, Agent Huff damaged or destroyed evidence when he examined the Maxtor hard drive without having connected the drive to a write block device. *Id.*, at 147. This did not happen.

As proof of this claim, the Defendant points to Randy Huff's trial testimony wherein he states:

> Q. (By Prosecutor) What -- did you have anything else to do with that particular hard drive?
>
> A. (By Huff) I did.
>
> Q. What was that?
>
> A. Later on -- if I can check my report here, within -- let's see. The 23rd of September -- 22nd of September I tried to conduct another preview using forensic software, and I still didn't find anything of value. The day after that I imaged the hard drive to my forensic machine.

(11/5/08, Tr.Trans., Vol. III at 86).

Because Agent Huff did not mention he used a write-block during his testimony, the Defendant assumes the worst - that Huff did not use a write-blocker. According to the attached affidavit of Agent Balliett/Bailey, this is not the case. *See* Attachment A. Agent Huff did use a write-block when he conducted his preview on September 22, 2006. No evidence was altered or compromised by his actions. Agent Huff did not somehow cause child pornography to be transferred to the Defendant's hard drive, as the Defendant implies in his memorandum. Defendant's Memorandum, at 152.

There are a number of problems with this "challenge." Procedural bar, conclusory pleading, and most importantly, it is pure fabrication. Thus, it must be denied.

2. Failure to Seize Modem/Router (Ground Four, Challenge II)

The Defendant next alleges that Agents Huff and Balliett should have seized the modem/router connected to his computer. Defendant's Memorandum, at 153. He states, "I challenge the BAD FAITH blatantly exhibited by SA Huff when he acknowledged that it was possible for the modem to contain relevant information that could be used in my defense. *Id.* Again, giving the Defendant the benefit of the doubt and examining this claim as if it were a properly plead ineffective assistance of counsel claim, it lacks merit. As with his other arguments, the Defendant offers us nothing more than conclusory statements regarding this claim. It should be denied on that ground alone.

Additionally, there is nothing to this claim on the merits. Ms. Loehrs, the Defendant's expert, testified that she believed that the modem/router could "possibly" contain information such as "IP addresses, port numbers, passwords, user names, configuration settings" (11/7/08, Tr.Trans., Vol. V, at 56). Agent Huff also testified that the modem/router might contain useful information, but that information is lost when the system is turned off (11/6/08, Tr.Trans., Vol. IV at 45). Thus, while the modem could "possibly" have contained valuable information, the Defendant fails to explain in any detail how that information "might" be "useful" to him. All we can do is speculate as to whether there was any information in the volatile memory of the modem/router and whether it might have been "useful" to the Defendant or to the government. Indeed, it is just as reasonable, and perhaps more reasonable, to speculate that the "lost" information might have damaged the Defendant's case. *United States v. Snyder*, 787 F.2d 1429, 1432 (10th Cir. 1986) (rebutting defendant's assertion additional testimony would have been helpful by concluding "it is at least as reasonable, and maybe more so, to speculate that the testimony of those witnesses would have damaged defendant's case"). In regards to this issue, the Defendant offers nothing more than speculation. Speculation cannot be the basis for relief in a § 2255 proceeding. *United States v. Boone,* 62 F.3d at 327 ("speculation ... cannot establish prejudice").

This claim must be denied.

3. Failure to Seize Entire Computer System (Ground Four, Challenge III)

For the third, but not the final time, the Defendant complains about the agents' failure to seize his entire computer system. *See* Defendant's Memorandum, at 155. The Defendant's argument, as presented in his memorandum, is procedurally barred. *United States v. Frady*, 456 U.S. 165-68 (1982); *see also* Defendant's Memorandum, at 155-56. However, the Defendant did present the issue for consideration under a *Strickland* analysis as he alleged his appellate attorney should have presented this argument on appeal. The government responded to that argument above at II.C.2.c., at page 59.

This issue lacks merit and must be denied.

4. Deprivation of Right to Confront "Witnesses" (Ground Four, Challenge IV)

Finally, the Defendant contends that by not seizing the entire computer system, the government deprived him of the right to "confront the witnesses against me." Defendant's Memorandum, at 164. The Defendant explains this rather novel argument as follows:

> Since the prosecution did not seize the entire Computer System, there was no chain of custody. No witness had viewed the evidence in the computer at my home and no witness could view the evidence as found at the scene of the crime after the hard drive was removed from the entire Computer System and taken from my home. Thus, I was denied my right to confront a witness against me. That witness against me was my entire Computer System. And the usefulness of that Witness was lost when it was not seized - thus the Government intentionally destroyed my ability to defend myself. The useful evidence was Lost and Destroyed in Bad Faith.

Id., at 165.

This argument as presented here is procedurally barred. *United States v. Frady*, 456 U.S. at 165-68 (1982). However, the Defendant did present the general issue of failure to seize the computer system for consideration under a *Strickland* analysis, as he alleged his appellate attorney should have presented this argument on appeal. The government responded to that argument above at II.C.2.c., at page 59. This issue lacks merit and must be denied.

F. Indictments (Ground Five)

1. Introduction

In the next section of his motion and supporting memorandum, entitled "Ground Five: Indictments," the Defendant raises four "challenges," all of which are a variation on the theme that the government's evidence was insufficient to convict him of the crimes charged or the evidence he introduced established a reasonable doubt as to his guilt. *See* Defendant's Memorandum, at 166-201. Not one of the four claims the Defendant raises in this section was included within his direct appeal. *See United States v. Solon*, 596 F.3d 1206 (2010). It has long been the rule in this circuit that 28 U.S.C. § 2255 is not a substitute for a direct appeal, and a prisoner cannot use it as a vehicle to challenge the sufficiency of the evidence used to convict him. *Payton v. United States*, 436 F.2d 575, 576-77 (10th Cir. 1970); *Williams v. United States*, 371 F.2d 536 (10th Cir. 1967); *Carrillo v. United States*, 332 F.2d 202 (10th Cir. 1964); *Curry v. United States*, 292 F.2d 576 (10th Cir. 1961). These four "challenges" simply cannot be considered on their merits.

Of course, a § 2255 claimant may raise a claim that his trial or appellate counsel was ineffective for not challenging the sufficiency of evidence. *Boyle v. McKune*, 544 F.3d 1132, 1140 (10th Cir. 2008). The Defendant has previously raised such a claim in his motion. *See* Defendant's Motion, at 13, and Defendant's Memorandum, at 57. The United States has responded to the Defendant's ineffective assistance of counsel claim based upon the failure of appellate counsel to challenge the sufficiency of evidence. *See* II.C.2.d. at 66. To the extent that the Defendant raises additional or different arguments in this section from those raised in his ineffective assistance of appellate counsel argument found at pages 122-127 of his memorandum, those new arguments simply cannot be considered. *Payton v. United States*, 436 F.2d at 576-77.

This claim must be denied.

G. Jury Prejudice (Ground Six)

In his last claim, the Defendant presents an argument that essentially reprises his earlier complaints concerning the conduct of the trial prosecutor. *See* Defendant's Memorandum, at 205-209. Additionally, he claims that he was victim of unfair prejudice created by the conduct of his attorney and the trial judge. The unfair prejudice created by his attorney is the familiar refrain that his trial attorney should have gotten more money for his expert. Additionally, he claims the trial judge prejudiced the jury by striking the testimony of Ms. Loehrs when she stated her work had been "stopped" by the court. *See* Defendant's Memorandum, at 209-212.

The United States has previously addressed the issues raised by the Defendant concerning the allegations he makes against the prosecutor and his own trial attorney. *See* above at II.B.1-9, at 14-43, and II.C.1-5, at 43-57. Additionally, the alleged prejudice the Defendant claims the trial court created by its decision to strike the testimony of Ms. Loehrs was part and parcel of the Defendant's direct appeal on the issue of structural error. In her brief to the Tenth Circuit, the Defendant's appellate counsel argued:

> [t]he timing of the judge's departure from the bench, in conjunction with his highly partisan comments impugning the truthfulness of Ms. Loehrs' testimony and undercutting the value of her services, affected the fairness of the trial. The judge's absence from the bench, in light of his deprecatory comments toward the defendant's expert, gave the jury the impression that he had already made up his own mind. Finally, the judge's statement to the jury, following closing arguments, that they would likely reach a verdict quickly, again left the impression that the judge had already made up his mind about Mr. Solon's guilt.

Appellant's Opening Brief, at 35, *United States v. Solon,* Tenth Circuit Court of Appeals, Docket 09-8018 (emphasis added).

The Tenth Circuit rejected this argument. The court noted that the trial judge made only one remark before the jury that might be considered deprecatory and "even in light of the judge's prior statement [telling the jury to disregard Ms. Lohers' testimony concerning being stopped from work as a "falsity"], [the Tenth Circuit panel] cannot agree with Mr. Solon that the district judge's absence could only be interpreted as discrediting Ms. Loehrs's testimony or Mr. Solon's defense." *United States v. Solon*, 596 F.3d at 1213. Since this issue was litigated in the Defendant's direct appeal, it cannot be reconsidered here. *United States v. Warner,* 23 F.3d at 291.

All of the cognizable claims that the Defendant raises in this "Ground" have previously been addressed in this response and shown to have no merit or are procedurally barred.

The Defendant is not entitled to any relief based upon the issues he has presented here.

CONCLUSION

For all the foregoing reasons, none of the Defendant's § 2255 claims have merit, and all must be rejected. Moreover, because each and every one of the Defendant's claims is wholly resolvable on the record that exists, there is no basis here for an evidentiary hearing. *Hooks v. Workman*, 606 F.3d 715, 730-31 (10th Cir. 2010).

DATED this 13th day of April, 2012.

Respectfully submitted,

CHRISTOPHER A. CROFTS
United States Attorney

By: */s/ James C. Anderson*
JAMES C. ANDERSON
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that on April 13, 2012, I served a true and correct copy of the foregoing **United States' Response to the Defendant's Motion to Vacate Sentence Under 28 U.S.C. § 2255** upon the following by depositing the same, postage prepaid, in the United States mail, addressed to:

Nathaniel Solon, 07069-091
USP Beaumont
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P O Box 26030
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/s/ Vicki Powell

For the United States Attorney's Office