IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

NATHANIEL SOLON Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	Case No. 2:11-CV-303-CAB Criminal Case No. 07-CR-032-CAB

ORDER DENYING MOTION UNDER 28 U.S.C. § 2255

This matter is before the Court upon a *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody. [Docket No. 11-CV-303-CAB, Doc. 1]. The Court having reviewed the Motion and subsequent pleadings, as well as the file herein, and being otherwise fully advised, FINDS the Motion should be DENIED.

TABLE OF CONTENTS

BACKGROUND

Procedural History

Nathaniel Solon [Petitioner] was charged by Indictment on January 18, 2007, with possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). [Docket No. 07-CR-023-CAB, Doc. 1][hereinafter "Doc. ____"]. He initially entered a plea of not guilty to the Indictment on January 26, 2007. [Doc. 7]. He subsequently changed his plea on the Indictment to guilty pursuant to a plea agreement on October 2, 2007. [Doc. 44, Doc. 45].

A sentencing hearing for Petitioner was initially set for January 22, 2008. The hearing was, however, continued three times, each time at Petitioner's request. [Docs. 55, 56, 57, 60, 62, 67, 68]. Petitioner then filed a motion to withdraw his guilty plea on April 3, 2008. [Doc. 73]. A hearing on the motion to withdraw was held April 16, 2008, after which the Court took the matter under advisement. [Doc. 77; Doc. 163, pp. 3-21]. The Court granted Petitioner's motion to withdraw his guilty plea on September 17, 2008, and trial was set for November 3, 2008. [Doc. 93].

Petitioner was charged by Superseding Indictment on September 25, 2008, with the original charge of unlawfully possessing child pornography, plus an additional charge

of attempted receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(1). [Doc. 98]. Petitioner entered a plea of not guilty to both charges on October 1, 2008. [Doc. 102]. A jury trial commenced November 3, 2008, and Petitioner was found guilty on both counts of the Superseding Indictment on November 10, 2008. [Docs. 121, 125, 126, 127,129, 130, 131; Doc. 162, pp. 2, 3].

Petitioner was sentenced on January 21, 2009, to serve concurrent terms of 72 months imprisonment on each conviction; a fine of $400; 5 years supervised release; and $200 in special assessments. [Doc. 140; Doc. 165, pp. 42-47]. The criminal judgment was entered January 26, 2009. [Doc. 141]. Petitioner filed a timely notice of appeal with the Tenth Circuit Court of Appeals on February 5, 2009. [Doc. 142].

Petitioner, on appeal to the Tenth Circuit, 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 of the Tenth Circuit, with one dissent, (Judge Lucero) affirmed Petitioner's conviction. *United States v. Solon*, 596 F.3d 1206 (10th Cir. 2010). Petitioner requested a rehearing *en banc*, which was denied on April 7, 2010. [Doc. 15, p. 3]. Petitioner then filed a petition for *writ of certiorari* with the United States Supreme

Court on June 17, 2010. [Doc. 173]. The Supreme Court denied the writ on October 4, 2010. *Solon v. United States*, 131 S.Ct. 213 (2010). [Doc. 174].

Any motion under § 2255 was required to be filed within one year of October 4, 2010. 28 U.S.C. § 2255(f)(1). Petitioner's motion filed September 7, 2011, is therefore timely. [Docket No. 11-CV-303-CAB, Doc. 1].

Historical Facts

The historical facts underlying the original Indictment and Superseding Indictment are fairly summarized in the presentence report [PSR], quoting from the Prosecutor's Statement.

> As the result of an investigation relating to the trading of child pornography on Internet file sharing sites, Immigration and Customs Enforcement Special Agent Nicole Balliett identified a computer in Casper, Wyoming, offering to share child pornography with other computer users using a file sharing network. Through the use of administrative subpoenas Balliett was able to determine the computer was located at 439 Melrose, Casper, the residence of the Defendant, Nathaniel Solon. On September 20, 2006, Balliett obtained a Federal search warrant authorizing the search of the Defendant's residence for items relating to child pornography. The search warrant was executed by Balliett and other members of the Wyoming Internet Crimes Against Children Task Force [1] on September 21, 2006. The Defendant was

[1] The Wyoming Internet Crimes Against Children Task Force (ICAC) is a law enforcement task force comprised of five (5) Wyoming Division of Criminal Investigation

present during the search. When questioned about his use of file sharing networks the Defendant admitted he had downloaded games and adult pornography using file sharing software but no child pornography.

The search warrant issued by Magistrate Beaman authorized agents to seize any computers and/or computer systems within the residence. Agents did find a computer belonging to the Defendant but did not find it necessary to take the entire computer system. Rather the agents removed the computer's hard drive [2] from the computer and elected to leave the remainder of the system behind. The agents decided not to seize the entire system because upon their initial preview of the digital files contained on the hard drive of the computer did not reveal any images of child sexual abuse. This fact, coupled with the Defendant's insistence he was innocent of any wrongdoing, lead the agents to only take the hard drive from his computer, which was a Maxtor hard

---

agents, one (1) Federal Bureau of Investigation agent, and one (1) Immigration and Customs Enforcement Bureau agent (Balliett). The mission of the task force is to investigate cases involving the exploitation of children facilitated by the use of technology. [Doc. 157, pp. 14, 15, 16].

[2] The term "hard drive" is actually short for "hard disk drive." The term "hard disk" refers to the actual disks inside the hard drive. All three terms, however, usually refer to the same thing, the place where data is stored within a computer, *i.e.* the locale within a computer system where files and folders are physically located. The data is magnetically stored on a stack of disks mounted inside a solid encasement. These disks spin extremely fast (typically at either 5400 or 7200 RPM) thus data can be accessed immediately from anywhere on the disks within the drive. Data is stored magnetically, therefore it stays on the hard drive disks even after the power supply is turned off. When a user saves data or installs a program on his/her computer, the information is typically placed on the hard disk. The hard drive transmits data back and forth between the central processing unit of the computer and the disk.

drive, serial number Y35609QE. This hard drive was manufactured in Singapore.

A subsequent forensic exam of the hard drive did reveal images of child sexual abuse within unallocated space on the hard drive. This indicates the child pornography had been present on the hard drive in the form of individual files and the Defendant deleted those files. Examiners were able to recover a total of 8 viewable files from the unallocated space on the Defendant's hard drive, 2 of which were duplicates. All of these files were downloaded on September 20, 2006, and subsequently deleted. It appeared from an examination of the Defendant's hard drive that he would download child pornography, view the downloaded files, and then delete the child pornography from the hard drive.

Most of the 8 recovered files depicted prepubescent children being sexually abused by adults. At least one of the recovered movies depicted a sadistic scene as it depicted a very young child, who appeared to be a toddler, bound and being vaginally penetrated. The examiners did not recover any evidence that the Defendant knowingly distributed any images of child pornography although it did appear he downloaded files with names consistent with child pornography on other occasions.

The Defendant, who plead guilty to the offense of possession of child pornography on October 3, 2007, was allowed to withdraw his guilty plea on September 17, 2008. Thereafter, the Grand Jury handed down a superseding indictment on September 25, 2008. The Superseding Indictment charged the Defendant with one count of possession of child pornography, in violation of

> 18 USC § 2252A(a)(5)(B) and (b)(2), and one count of attempted receipt of child pornography, in violation of 18 USC § 2252A(a)(2) and (b)(1). The Defendant pleaded not guilty to these charges on October 1, 2008, and his jury trial commenced on November 3, 2008. On November 7, 2008, the Defendant testified on his own behalf and claimed that did not remember his computer use of September 20, 2006 but emphatically denied that he had ever possessed or tried to possess child pornography. On November 10, 2008, a 12 person jury found the Defendant guilty of both charges. [*sic*].

[PSR, pp. 3, 4, 5].

The evidence presented at trial established a computer using an IP address assigned to Petitioner was observed, on four separate dates during the summer of 2006, offering files containing child pornography for download on a peer-to-peer file sharing software program known as Limewire.[3] [Doc. 157, pp. 18-87]. Department of Homeland Security, Immigration & Customs [ICE] Special Agent Nicole Balliett,[4] a member of ICAC, obtained a federal

---

[3] "Peer-to-peer (P2P) networking applications such as Limewire (and others, BitTorrent, Gnutella, eDonkey, Grokster, Kazaa) directly connect 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). 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, 1222. [Doc. 159, pp. 1-53].

[4] Ms. Balliett is now married and uses the last name Bailey. She will be referred to herein as Ms. Balliett, the name which appears in the Court records.

search warrant on September 18, 2006, to search Petitioner's residence for evidence relating to the possession, receipt, distribution, and production of child pornography. [Doc. 157, pp. 9-10, 14, 102-107]. The search warrant application detailed the fact ICAC agents had logged a computer, using an IP address assigned to Petitioner's residence, offering child pornography files for download to other peer to peer software users in June, 2006.

ICE Agent Balliett, after obtaining the search warrant, accompanied by Wyoming Division of Criminal Investigation (DCI) Special Agent Randy Huff, met with Petitioner as his place of employment. [Doc. 157, p. 56]. Petitioner acknowledged he owned a computer, which was located at his residence, which had Limewire software installed. He stated he used the Limewire software to download music, computer games, and adult pornography. He indicated, during the interview, he had used Limewire the previous evening, September 20, 2006, in an attempt to download a computer game, Grand Theft Auto, however, his anti-virus software had prevented the download. [Doc. 157, pp. 56-59, 61). Agents Balliett and Huff informed Petitioner they intended to search his residence, and he agreed to accompany them. [Doc. 157, p. 59].

Agent Balliett, after arrival at Petitioner's residence, continued to question him while Agent Huff and other agents conducted a search of the premises. [Doc. 157, pp. 59, 60].

Agent Huff located Petitioner's computer, which was turned on and running, near the kitchen of the home. He initially determined the system clock and other components of the system were functioning properly. [Doc. 159, pp. 69, 71, 83, 84]. He 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 Petitioner's computer was the same computer which had been observed by law enforcement personnel during the summer of 2006 offering files containing child pornography for download. [Doc. 159, pp. 70-80]. The software Agent Huff used to conduct his on-scene preview was not capable of locating and examining the contents of files which had been deleted. He thus decided to seize the hard drive and conduct a more thorough examination of it at his office. [Doc. 159, pp. 81-85].

Petitioner, while Agent Huff was conducting his search, told Agent Balliett once again he had used Limewire the previous night, September 20, 2006, in an attempt to download the computer game known as Grand Theft Auto. [Doc. 157, p. 61]. He further admitted to previous use of Limewire to download several files containing adult pornography. [Doc. 157, p. 61].

---

[5] The term "image," in the context of files containing child pornography, is used to denote both still and video files unless otherwise noted.

Agent Huff, during his forensic exam of the hard drive from Petitioner's computer, found, consistent with Petitioner's prior statements, the Limewire program, on September 20, 2006, shortly after 8:00 p.m., was used to download two computer games - Grand Theft Auto and Madden. [Doc. 159, pp. 118-119]. [6] Agent Huff stated neither of these downloads was successful. The anti-virus software on Petitioner's computer deleted at least one of those files. [Doc. 159, pp. 120, 121]. [7]

The forensic exam by Agent Huff also revealed the computer was used between 8:51 p.m. and 9:11 p.m., on September 20, 2006, to play online poker at a web site "PartyPoker.com" under the screen name "solon40." [Doc. 159, pp. 123-124]. Petitioner, during his trial testimony, stated 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. [Doc. 161, pp. 75,76, 99].

The forensic exam by Agent Huff further revealed that on September 20, 2006, at 9:16 p.m., within five minutes from the time the last poker hand was played, video files with

---

[6] Madden is a computer football game named after former coach and commentator John Madden. [Doc. 159, p. 119].

[7] Agent Huff also testified his exam of the hard drive revealed Petitioner had anti-virus software installed on his computer, and it was working properly. Agent Huff found no active viruses on the hard drive. [Doc. 159, pp. 93, 94].

names highly consistent with child pornography began to download to a folder set up by the Limewire program known as the "incomplete folder."[8] Agent Huff explained the incomplete folder is where files which are being downloaded are "assembled." [Doc. 159, pp. 42, 106, 107, 125]. Agent Huff also testified 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 Petitioner's computer. [Doc. 159, pp. 125, 126, 127]. He stated Limewire has a function known as "preview" which allows a user to view the content of digital still image and video files as they are being downloaded. [Doc. 159, p. 126]. Agent Huff stated during the download of the forty-six files, twenty-nine of those files had been previewed. [Doc. 159, p. 163].[9]

The United States introduced seven digital videos depicting children engaged in sexually explicit conduct which were downloaded on September 20, 2006, between 9:15 p.m.

---

[8] Agent Huff testified while every file which 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. [Doc. 159, p. 128].

[9] Agent Huff also testified utilization of the preview function does not always allow a view of the file content being downloaded. "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." [Doc. 159, p. 130].

and 10:00 p.m. Each of the videos was recovered from unallocated space on Petitioner's hard drive. [Doc. 159, pp. 111, 112, 133]. Agent Huff stated it was apparent from his exam of the hard drive Petitioner would enter a search term consistent with child pornography, download files offered 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. [Doc. 159, pp. 125, 129; Doc. 161, pp. 49, 50].

Petitioner testified at trial on his own behalf. He claimed he did not remember his computer use on September 20, 2006, and denied he had ever attempted to download or possess child pornography. [Doc. 161, pp.69,70]. Petitioner also called as a witness Ms. Loehrs, a forensic examiner, who testified she found no evidence Petitioner had viewed the child pornography found on his hard drive, and it was possible Petitioner's computer was compromised by some type of malware which would allow a third party to access the computer. [Doc. 161, pp. 159-161; Doc. 158, pp. 29, 59, 60, 61]. The jury, on November 10, 2008, found Petitioner guilty of possession, and attempted receipt of, child pornography. [Doc. 131].

The trial judge ordered a presentence report (PSR) be prepared. [Doc. 160, pp. 4, 5]. The PSR indicated a final offense level of 34, which, with Petitioner's criminal history score of six points, placed him in Criminal History Category III. [PSR, p. 6, ¶ 19; pp. 7-10, ¶¶

23-29]. The advisory sentencing guideline range for Petitioner was thus 188 to 235 months imprisonment. [PSR, p. 14 ¶ 53].

The Court, at Petitioner's sentencing, declined to follow the recommendations of the PSR with regard to at least one offense characteristic, a two offense level enhancement for obstruction of justice. [Doc. 165, p. 12]. The Court further determined Petitioner was entitled to a variance of seven offense levels which brought his final offense level to 25, resulting in an advisory sentencing range of 70 to 87 months. [Doc. 165, pp. 41, 42]. Petitioner was thus 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.[Doc. 165, pp. 42-47; Doc. 141].

APPLICABLE LEGAL PRINCIPLES

Section 2255 entitles a prisoner to relief "[i]f the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255(b). The standard of review applied to § 2255 motions is stringent. "Only if the violation constitutes a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair

procedure can § 2255 provide relief." *United States v. Gordon,* 172 F.3d 753, 755 (10th Cir. 1999) (internal quotations omitted). The Court presumes the proceedings which led to a defendant's conviction were correct. *Parke v. Raley,* 506 U.S. 20, 29, 30 (1992).

"Section 2255 is not available to test the legality of matters which should have been raised on appeal." *United States v. Allen*, 16 F.3d 377, 378 (10th Cir. 1994). "A defendant who fails to present an issue on direct appeal is barred from raising the issue in a § 2255 motion, unless he can show cause for his procedural default and actual prejudice resulting from the alleged errors, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed." *United States v. Allen,* 16 F.3d at 378. "[I]f the government raises procedural bar, the courts must enforce it and hold Petitioner's claims procedurally barred unless cause and prejudice or a miscarriage of justice is shown." *United States v. Allen,* 16 F.3d at 378.

A petitioner, in order to establish "cause," must show there existed some external impediment which prevented the raising of a claim during the original proceedings in the case, or on direct appeal. *Murray v. Carrier*, 477 U.S. 478, 492 (1986). A petitioner could show "cause" by demonstrating the claim was so novel that its legal basis was not reasonably available to petitioner's counsel. *Reed v. Ross*, 468 U.S. 1, 16 (1984). Neither ignorance nor

inadvertence are, however, sufficient in this regard, nor does a failure to recognize the factual or the legal basis for the claim. *Reed v. Ross*, 468 U.S. at 16.

"A defendant may establish cause for his procedural default by showing that he received ineffective assistance of counsel in violation of the Sixth Amendment." *U.S. v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995)(citations omitted).

The Supreme Court has recognized an exception to the general rule for claims of ineffective assistance of counsel which were not raised on direct appeal. "We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." *Massaro v. United States*, 538 U.S. 500, 504 (2003).

"To establish a claim for ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was constitutionally deficient, and (2) counsel's deficient performance was prejudicial." *U.S. v. Cook*, 45 F.3d at 392 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)); *Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S.Ct. 1411, 1419 (2009); *Harrington v. Richter*, ___ U. S.____, 131 S.Ct. 770, 787-792 (2011). Counsel's performance is deficient if the representation "falls below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. at 690. Prejudice entails "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different." *Strickland v. Washington*, 466 U.S. at 694. A petitioner, to prove his lawyer's performance was deficient, must show the attorney's performance was not within the wide range of competence demanded of attorneys in criminal cases. *Laycock v. State of New Mexico*, 880 F.2d 1184 (10th Cir. 1989).

Logic would seem to dictate a defendant must show deficient performance before showing how such performance prejudiced him. A reviewing court, however, may consider the two inquiries, performance and prejudice, in any order, and there is no reason "to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland v. Washington*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which [the Supreme Court] expect[s] will often be so, that course should be followed." 466 U.S. at 697.

A § 2255 motion must "state facts that point to a real possibility of … error." *United States v. Moya*, 676 F.3d 1211, 1213 (10th Cir. 2012) (quotation and citation omitted). A § 2255 motion based on ineffective assistance of counsel which fails to adequately allege prejudice by explaining how the result would have been any different, "lack[s] any colorable merit" and should be dismissed. *United States v. Moya*, 676 F.3d at 1214. *See also*, *United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994) (reviewing court is "not required to fashion Defendant's arguments for him where his allegations are merely conclusory in nature

and without supporting factual averments"); *United States v. Tooley*, ____ Fed. Appx. ___, 2013 WL 1136954 * 2 (10th Cir. 2013)(quoting *United States v. Fisher*, 38 F.3d at1147).

The proper standard for measuring attorney performance is not one of perfection. *United States v. Haddock*, 12 F.3d 950, 955, 956 (10th Cir. 1993). It is rather one of reasonably effective assistance. *Gillette v. Tansy*, 17 F.3d 308, 310, 311 (10th Cir. 1994).

A petitioner, to establish prejudice, has a difficult burden. More than a theoretical effect must be shown on the outcome of petitioner's case as a result of attorney errors. A petitioner must show that, but for those errors, there is a reasonable probability the results would have been different, *i.e.*, petitioner would have been acquitted, or would not have pleaded guilty, or would have received a more favorable sentence. *Strickland v. Washington,* 466 U.S. at 694. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Lasiter v. Thomas*, 89 F.3d 699, 703 (10th Cir. 1996).

> "In analyzing whether counsel's alleged errors prejudiced petitioner, [the Court] must keep in mind the standard to be applied in assessing whether petitioner is entitled to an evidentiary hearing in federal court on his ineffectiveness claim. First, the petitioner bears the burden of alleging facts which, if proved, would entitle him to relief. Moreover, his allegations must be specific and particularized; conclusory allegations will not suffice to warrant a hearing."

Hatch v. State of Oklahoma, 58 F.3d 1447, 1457 (10th Cir. 1995) (overruled on other grounds by *Daniels v. United States*, 254 F.3d 1180, 1188 n.1 (10th Cir. 2001)) (citations and quotations omitted). If he is unable to meet this burden with regard to either prong of the test, his motion must be denied. *Hatch v. State of Oklahoma*, 58 F.3d at1457. This requirement must be satisfied even where a petitioner is proceeding *pro se*, and notwithstanding the usual rule that *pro se* pleadings are to be liberally construed. *United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994).

The Court's review, in measuring an attorney's performance, must be highly deferential:

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

Strickland v. Washington, 466 U.S. at 689 (citations and quotation omitted). *See also*, *United States v. Taylor*, 454 F.3d 1075, 1079 (10th Cir. 2006) (quoting *Strickland v. Washington*, 466 U.S. at 689).

DISCUSSION

Petitioner, in support of his claim for relief under § 2255, alleges a myriad of errors including 1) Prosecutorial Misconduct; 2) Ineffective Assistance of Trial and Appellate Counsel; 3) Illegal Search and Seizure; 4) Lost and Destroyed Evidence; 5) Indictments; and 6) Jury Prejudice. [Docket No. 11-CV-303-CAB, Doc. 1, pp. 7-25, 31].

Prosecutorial Misconduct

Prosecutor Acted in Bad Faith by Ignoring Right to the Presumption of Innocence

Petitioner alleges his "Fifth Amendment guarantee of due process was violated when [the prosecutor], in bad faith, ignored my right to be presumed innocent." [Docket No. 11-CV-303-CAB, Doc. 1, p. 41]. His basis for this claim simply asserts the prosecutor did not have his "investigator dig further for the truth to ensure 'the innocent are not unjustly charged.'" [Docket No. 11-CV-303-CAB, Doc. 1, p. 48]. Petitioner, however, fails to offer any cogent argument or case authority in support of this contention. He merely provides extended quotations from the trial and sentencing transcripts without any coherent explanation of how the statements and testimony recited meet the stringent standard of

review applicable to § 2255 motions. *United States v. Gordon,* 172 F.3d 753, 755. [Docket No. 11-CV-303-CAB, Doc. 1, pp. 41-48].

There is, in addition, simply no indication whatsoever in the record before the Court to suggest the United States prosecution team ignored or glossed over evidence which might have been favorable to Petitioner, particularly in light of the "weeks" of work, "hundreds" of hours spent by the team preparing for trial. [Doc. 161, pp. 5, 6]. The Tenth Circuit, in its decision affirming Petitioner's conviction, 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, 596 F.3d at 1213. (emphasis added).

This allegation by Petitioner is, as well, procedurally barred. He has neglected to justify under the well established standards, including a valid ineffective assistance of counsel challenge, his failure to raise this assertion either at trial or on appeal. *United States*

v. Solon, 596 F.3d at 1208; *Park v. Raley*, 506 U.S. at 29, 30; *United States v. Allen*, 16 F.3 at 378; *Murray v. Carrier*, 477 U.S. at 492; *United States v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504.

Petitioner's assertion the prosecutor somehow ignored his right "to be presumed innocent" is without merit.

Misleading the Jury re: United States Computer Forensic Expert

Petitioner contends the prosecutor somehow committed a fraud upon the Court and jury by misleading them with regard to the credentials of DCI Agent Randy Huff, the United States investigator who conducted the forensic computer exam in this case. Petitioner asserts "[the trial prosecutor] . . . purposely misled the court by diminishing the skills of my forensic computer experts while overinflating the skills of Agent Huff." [Docket No. 11-CV-303-CAB, Doc. 1, p. 13]. Petitioner, once again, fails to offer any cogent argument or case authority in support of his contention. He merely provides extended quotations from the trial transcript which are simply the testimony of Agent Huff juxtaposed against the testimony of his own forensic expert, Ms. Loehrs. Petitioner provides these quotes, however, without any coherent explanation of how the testimony recited meets the stringent standard of review applicable to § 2255 motions. *United States v. Gordon,* 172 F.3d at 755. [Docket No. 11-CV-303-CAB, Doc. 1, pp. 49-63].

The simple essence of Petitioner's assertion is the jury should have believed the defense expert, Ms. Loehrs, not Agent Huff on behalf of the United States. Such an assertion is not however, one which merits § 2255 review. Petitioner's argument is basically a sufficiency of the evidence claim which cannot be raised or considered in the first instance in a § 2255 proceeding. *Payton v. United States*, 436 F.2d 575, 577 (10th Cir. 1970).

This allegation by Petitioner is, as well, procedurally barred. He has neglected to justify under the well established standards, including a valid ineffective assistance of counsel challenge, his failure to raise this assertion either at trial or on appeal. *United States v. Solon*, 596 F.3d at 1208; *Park v. Raley*, 506 U.S. at 29, 30; *United States v. Allen*, 16 F.3 at 378; *Murray v. Carrier*, 477 U.S. at 492; *United States v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504.

Petitioner's assertion the prosecutor somehow committed a fraud upon the Court and jury is without merit.

Falsification of Evidence

Petitioner next asserts the trial prosecutor "in bad faith, falsified evidence in order to extort a guilty plea from me." [Docket No. 11-CV-303-CAB, Doc. 1, p. 64]. Petitioner essentially claims he was "tricked" into pleading guilty by evidence manufactured by the prosecutor. Petitioner was, however, subsequently allowed to withdraw his previous guilty

plea and proceed to trial. It is thus difficult to postulate any circumstances under which Petitioner's Fifth Amendment guarantee of due process was violated, or how he was somehow prejudiced by any alleged "falsified evidence," even presuming he relied on such "evidence," considering the fact he was ultimately permitted to withdraw his plea of guilty and proceed to trial. [Doc. 163, p. 20; Doc. 96].

Petitioner's assertion the prosecutor somehow falsified evidence is obviously without merit.

Vindictive Prosecution

Petitioner, as previously noted, entered a guilty plea, pursuant to a plea agreement, to the sole count contained in the original indictment, possession of child pornography, on October 2, 2007. [Doc. 44, Doc. 45]. The Court subsequently allowed Petitioner to withdraw his guilty plea on September 17, 2008. [Doc. 163, p. 20; Doc. 96]. He was thereafter charged in a superseding indictment with the original count of possession of child pornography, as well as an additional count of attempted receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1). [Doc. 98]. Petitioner now asserts, for the first time in his § 2255 petition, he was the victim of a vindictive prosecution constituting a violation of his right to due process.

The Tenth Circuit has thoroughly addressed what a petitioner (or defendant) must prove in order to demonstrate prosecutorial vindictiveness.

> To prove prosecutorial vindictiveness, the 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), *cert. denied,* 522 U.S. 1137, 118 S.Ct. 1098 (1998). 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 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, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); *United States v. Goodwin,* 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982).

United States v. Sarracino, 340 F.3d 1148, 1177, 1178 (10th Cir. 2003). *See also*, *United States v. Tucker*, 298 Fed. Appx. 794, 800 (10th Cir. 2008)

The Court has, as well, addressed the standards for considering an allegation of prosecutorial vindictiveness.

> In determining whether the government has engaged in prosecutorial vindictiveness, this 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.), *cert. denied,* 522 U.S. 839, 118 S.Ct. 116, 139 L.Ed.2d 68 (1997). However, the Supreme Court has held that a prosecutor may threaten to charge a greater offense if a defendant will not plead guilty to a lesser one, as long as the prosecutor has probable cause to believe that the defendant committed the greater offense. *Bordenkircher,* 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604.

United States v. Sarracino, 340 F.3d at 1178.

And, as the United States Supreme Court has noted,

> [a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we made clear in *Bordenkircher*, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

United States v. Goodwin, 457 U.S. 368, 382 (1982)(footnotes omitted). *See also*, *United States v. Sarracino*, 340 F.3d at 1177; *United States v. Reeves*, 450 Fed. Appx. 740, 742, 743 (10th Cir. 2011).

A prosecutor's charging discretion is broad, *United States v. Goodwin*, 457 U.S. at 382, 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 becoming an issue. The Supreme Court has made clear "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, 569 (1984). The Supreme Court, recognizing 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, has held 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. A presumption of vindictiveness in the pretrial setting has, however, generally been found to be inapplicable. A petitioner (or defendant), in order to prove vindictive prosecution at the early stages of a criminal prosecution, must establish the enhanced charge or sentence was motivated by actual vindictiveness. *Wasman v. United States*, 468 U.S. at 568.

The Tenth Circuit has recognized

> 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 violative. 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.'"

United States v. Contreras, 108 F.3d at 1262 (*citing United States v. Goodwin*, 457 U.S. at 372, and *quoting Bordenkircher v. Hayes*, 434 U.S. at 357).

The Tenth Circuit has thus directed 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 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)). And, as noted previously, a petitioner (or defendant), in order to establish a claim of vindictive prosecution, must show either: (1) actual vindictiveness, or (2) a reasonable likelihood of vindictiveness, which then raises a presumption of vindictiveness. *United States v. Sarracino*, 340 F.3d at 1177, 1178. Once the defendant successfully establishes either of the two requirements, the burden shifts to the prosecution to justify its charging decision with "legitimate, articulable, objective reasons." *United States v. Sarracino*, 340 F.3d at 1177, 1178. 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. *United States v. Sarracino*, 340 F.3d at 1177, 1178.

Petitioner has completely failed to support in any manner his claim of prosecutorial vindictiveness. He has cited nothing in the record before the Court which in any way would sustain a claim of actual vindictiveness, or which even remotely suggests the trial prosecutor was motivated by animus or vindictiveness. The trial record rather clearly indicates the forensic analysis of Petitioner's hard drive revealed that in addition to possessing images of child pornography, he had also attempted to download a number of images of child pornography on September 20, 2006. [Doc. 159, pp. 160-163]. The inclusion by the United States of a receipt charge in the superseding indictment issued before trial was simply an attempt to develop a stronger case against Petitioner. Such action by the United States is clearly permissible, and in light of the fact the new charge was added before trial, eliminates any presumption of vindictiveness. *United States v. Goodwin*, 457 U.S. at 384. *See also*, *United States v. Reeves*, 450 Fed. Appx at 742.

The record before the Court supplies no justification whatsoever for a claim of vindictive prosecution by the United States. The record is devoid of any indication of actual vindictiveness, and, given the fact the superseding indictment was issued before Petitioner's trial, any presumption of vindictiveness is inapplicable as well.

This allegation by Petitioner is, as well, procedurally barred. He has once again neglected to justify under the well established standards, including a valid ineffective assistance of counsel challenge, his failure to raise this assertion either at trial or on appeal. *United States v. Solon*, 596 F.3d at 1208; *Park v. Raley*, 506 U.S. at 29, 30; *United States v. Allen*, 16 F.3 at 378; *Murray v. Carrier*, 477 U.S. at 492; *United States v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504.

Failure to Introduce the Hard Drive

Petitioner, in his fifth allegation of prosecutorial misconduct, contends the failure of the prosecutor to introduce the actual hard drive from his computer equates to prosecutorial misconduct. The essence of his argument alleges:

> During trial, [the trial prosecutor] never moved for the introduction of the hard drive into evidence. A photograph of the hard drive was introduced as Government Exhibit 21, [footnote omitted] 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.

[Docket No. 11-CV-303-CAB, Doc. 1, p. 74]. Petitioner has failed to cite any legal authority for this rather novel proposition which would require the prosecution to introduce into

evidence the actual hard drive containing the digital images of child pornography in order to sustain a conviction for either possession or attempted receipt of child pornography.

The gravamen or essence of the crimes for which Petitioner was convicted relate to the possession and seeking of child pornography. Images of child pornography, in the form of video clips, were found on the hard drive and introduced into evidence. [Doc. 157, p. 27, Doc. 159, pp. 79, 117, 133, 145, 149]. A picture of the hard drive was also introduced. [Doc. 159, pp. 87, 88]. Petitioner, while he argues the actual hard drive should have been introduced, fails to indicate what prejudice, if any, he suffered based on the lack of the actual hard drive as a physical piece of evidence. He has thus failed to fulfill the stringent standards for granting relief pursuant to a § 2255 motion, *United States v. Gordon*, 172 F. 3d at 755, and has failed to overcome the presumption the proceedings leading to his conviction were correct. *Parke v. Raley*, 506 U.S. at 29, 30.

This allegation by Petitioner is, as well, procedurally barred. He has, as noted previously, neglected to justify under the well established standards, including a valid ineffective assistance of counsel challenge, his failure to raise this assertion either at trial or on appeal. *United States v. Solon*, 596 F.3d at 1208; *Park v. Raley*, 506 U.S. at 29, 30; *United States v. Allen*, 16 F.3 at 378; *Murray v. Carrier*, 477 U.S. at 492; *United States v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504.

Suppression of Material Evidence

Petitioner, in furtherance of his prosecutorial misconduct allegation, asserts "[m]y Fifth Amendment right to due process was violated when [the trial prosecutor] in bad faith suppressed material evidence from the Court." [Docket No. 11-CV-303-CAB, Doc. 1, p. 78] Petitioner alleges the material evidence suppressed was the fact a duplicate forensic copy of his hard drive was made by DCI agents as part of their forensic exam of that drive. "[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." [Docket No. 11-CV-303-CAB, Doc. 1, p. 80].

The Court, early in the history of this matter, ordered the hard drive from Petitioner's computer be placed in the registry of the Court, with neither party being able to examine it without a representative of the other party being present. [Doc. 23]. Agent Huff, however, within forty-eight hours of the seizure of the hard drive, and prior to the Court's order, had already made a forensic copy of the hard drive. [Doc. 159, pp.85, 86]. Counsel for the United States has indicated the forensic copy in the custody of DCI was segregated from use by anyone after the original hard drive had been placed in the registry of the Court. [Docket No. 11-CV-303-CAB, Doc. 15, p. 24].

The arrangement for access to Petitioner's hard drive as ordered by the Court proved difficult to implement, thus Petitioner and the United States both requested the Court alter its prior order. [Doc. 61, Doc. 65]. The Court thereafter modified its original order to allow the United States unrestricted access to the hard drive for forensic exam purposes. [Doc. 66]. The DCI agents and Petitioner's experts thereafter again accessed the forensic copy of the hard drive. [Docket No. 11-CV-303-CAB, Doc. 15, p. 24].

Petitioner, in supporting this prosecutorial misconduct challenge, has offered no showing of prejudice, and once again has provided no authority which would indicate what he has alleged even minimally fulfills the stringent standards for granting relief pursuant to a § 2255 motion. *United States v. Gordon*, 172 F. 3d at 755. He has, in addition once again failed to overcome the presumption the proceedings leading to his conviction were correct. *Parke v. Raley*, 506 U.S. at 29, 30.

This allegation by Petitioner is, as well, procedurally barred. He has once again neglected to justify under the well established standards, including a valid ineffective assistance of counsel challenge, his failure to raise this assertion either at trial or on appeal. *United States v. Solon*, 596 F.3d at 1208; *Park v. Raley*, 506 U.S. at 29, 30; *United States v. Allen*, 16 F.3 at 378; *Murray v. Carrier*, 477 U.S. at 492; *United States v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504.

Denial of Right to Fair/Impartial Jury by Showing Child Pornography to Jury

Petitioner next alleges the United States engaged in prosecutorial misconduct when it introduced and published to the jury images of child pornography. [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 2]. He argues "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 except to inflame them and induce decision on a purely emotional basis." [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 3]. He posits it was particularly egregious to allow introduction and publication to the jury of United States Exhibits 10, 11, and 12 since they were not found on his computer when it was confiscated, but rather were files the United States insisted were available on his computer for sharing on June 23, 2006. [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 4]. The core of Petitioner's objection is his claim "[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.'" [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 3].

The admission of electronically stored information ("ESI") in the form of files found on a computer is guided by a five step analysis of the applicable evidentiary rules.

> Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered: (1) is the ESI **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 ESI is what it purports to be); (3) if the ESI 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 ESI that is being offered as evidence an **original** or **duplicate** under the original writing rule, of 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 ESI 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)(emphasis in original).

The superseding indictment in this matter charged Petitioner 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."

[Doc. 98, p. 1 (emphasis added)].

Count Two alleged:

> [o]n or about September 20, 2006, in the District of Wyoming, 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.*

[Doc. 98, pp. 1, 2 (emphasis added)].

Any digital image of child pornography found on the hard drive of Petitioner's computer, particularly those images introduced to the computer on September 20, 2006, in light of the nature of the indictment charges, constituted relevant evidence under Rule 401, Fed. R. Evid. United States 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, Petitioner's computer. [10] Agent Huff testified the referenced images were

---

[10] A review of the highly suggestive names of the videos found in each of the referenced exhibits leaves little doubt the content relates to child pornography:

Exhibit 22 -"[PTHC] Porn _BB Sex_Not Yet 2yos Masturbation Aid_BabyGirl 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

introduced to Petitioner's computer on September 20, 2006, between 9:15 p.m. and 10:00 p.m. using the Limewire software program installed on the computer. The forensic evidence revealed a function of the Limewire software which allows a user to view an image file, both still and video, as it is being downloaded, was utilized when five of the referenced exhibits/videos were downloaded. [Doc. 159, pp. 116, 117, 133, 136, 139, 149-150]. The United States, in addition, introduced evidence to show: (1) the computer from which the videos were recovered belonged to Petitioner [Doc. 157, pp. 57-63]; (2) Petitioner admitted he had used his computer and the Limewire software during the evening hours of September 20, 2006 [Doc. 157, pp. 57-36]; and (3) the videos had not been altered, edited, or otherwise changed [Doc. 159, pp. 133-149]. Each of the referenced exhibits was shown to be relevant,

---

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! heavybreathing and gasps of 'yeah' as little 5yos kiddy cunt so greatlyrelieved!!! (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."]

authentic, non-hearsay, and exactly the same as the file which existed on the hard drive of Petitioner's computer.

Petitioner's primary objection, based on his pleadings, to introduction by the United States of child pornography digital images, asserts such introduction was an attempt to unfairly prejudice the jury. The exhibits thus should have been excluded pursuant to Rule 403. His argument is, however, foreclosed by a decision of the Tenth Circuit.

> The district court did not abuse its discretion in admitting the exhibits that Schene challenges on appeal. In *United States v. Campos*, 221 F.3d 1143, 1148 (10th Cir. 2000), we 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." We explained that, in contrast to the evidence at issue in *Old Chief v. United States,* 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (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 instant case, the images charged in the indictment—and admitted as evidence in Exhibits 5, 7, 10, 11, and 13—were the gist of the government's current case against Schene. The government was entitled to prove its case, and given the charges against Schene, those images were not unfairly prejudicial under Rule 403. *See Old Chief,* 519 U.S. at 186–87, 117 S.Ct. 644 (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").

United States v. Schene, 543 F.3d 627, 643 (10th Cir. 2008).

The superseding indictment against Petitioner similarly charged him with possessing and attempting to receive digital images of child pornography, the very items admitted as evidence in Exhibits 22, 23, 24, 25, 26(b), 27(b), and 28(b). Those exhibits were the crux of the United States case against Petitioner. The United States was entitled to prove its case, and in light of the charges against Petitioner, the images presented to the jury were not unfairly prejudicial under Rule 403. *Old Chief v. United States,* 519 U.S. at 186-187 (stating 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").

Petitioner also makes an ancillary argument which alleges the child pornography images should not have been admitted without proof he had viewed them. The United States, as discussed previously, did present circumstantial evidence Petitioner viewed the five images designated as Government's Exhibits 22, 23, 24, 25, 26(b) and 27(b) during the download process. Agent Huff also testified, however, there is no way to establish with

absolute certainty through the forensic examination of electronic storage media that a file had been viewed. [Doc. 159, pp. 145, 146, 147]. Acceptance of Petitioner's argument would thus set a standard for admissibility which, arguably, could never be achieved absent an admission by a defendant, eye-witness testimony from a third-party, or some other form of direct evidence. It is highly unlikely any purveyor of child pornography would ask someone who was likely to testify against them to watch as they downloaded and viewed child pornography. Petitioner's allegation the trial court improperly failed to require absolute proof by direct evidence he had viewed the images of child pornography is unsupported by any case or statutory authority, and is simply without merit.

Petitioner also challenges the admission of United States Exhibits 10, 11, and 12. Those exhibits contained digital images of child pornography being offered for download from Petitioner's computer on June 23, 2006. [Doc. 159, pp. 52-60]. Petitioner is correct when he alleges the images in United States Exhibits 10, 11, 12 were not recovered during the forensic review of the hard drive on his computer. Such fact, however, in and of itself, does not effect admissibility. Agent Huff testified one of his fellow investigators, DCI Special Agent Flint Waters, on June 23, 2006, was able to locate a computer using a specific internet protocol address and "browse" or review all of the files which that computer was offering for download to other peer-to-peer software users. [Doc. 159, pp. 52-60]. Agent

Waters, as part of his "browse" activities, was able to capture the SHA1 value of each file being offered for download by Petitioner's computer. [Doc. 159, pp. 52-60]. Every file has a unique SHA1 value - or "digital fingerprint," as described by Agent Huff, thus there could be no doubt the three images embodied in United States Exhibits 10, 11, and 12 were exactly the same as the files being offered by Petitioner for download on June 23, 2006. [Doc. 159, pp. 14, 15, 52-60]. The contention by Petitioner the United States Exhibits 10, 11, and 12 were not found on his computer is simply incorrect. Exact copies of those three exhibits were found on his computer during a browse conducted by Agent Waters. Those three exhibits were, therefore, clearly authenticated prior to their admission and publication.

The images in United States Exhibits 10, 11, 12 were also offered to show Petitioner's state of mind, *i.e.*, knowledge, lack of mistake or other innocent reason, and intent, [Doc. 159, pp. 60-61], a legitimate and recognized purpose for allowing the admission and publication of child pornography images. *United States v. Schene*, 543 F.3d at 643-644; *United States v. Simpson*, 152 F.3d 1241, 1249 (10th Cir. 1998) (affirming a district court 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"); *United States v. Burgess*, 576 F.3d 1078, 1099, 1100 (10th Cir. 2009).

There is, in summary, no merit whatsoever to Petitioner's assertion it was improper to allow the jury to view the ten images of child pornography admitted during his trial.

This allegation by Petitioner is, as well, procedurally barred. He has again neglected to justify under the well established standards, including a valid ineffective assistance of counsel challenge, his failure to raise this assertion either at trial or on appeal. *United States v. Solon*, 596 F.3d at 1208; *Park v. Raley*, 506 U.S. at 29, 30; *United States v. Allen*, 16 F.3 at 378; *Murray v. Carrier*, 477 U.S. at 492; *United States v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504.

Denial of Right to Fair Trial and Presumption of Innocence by Prosecutor When He "Confused the Issues and Wasted Time."

Petitioner next alleges prosecutorial misconduct based upon the rather unique argument the "[trial prosecutor], in bad faith, spent close to two days wasting the Court's time, while presenting extremely confusing, prejudicial and irrelevant information. [His] behavior violated my Fifth and Sixth Amendment rights to due process and trial by an impartial jury," [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 20], and "managed to confuse the jury and the Court," [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 7].

Petitioner, apparently in support of his "confuse and waste of time" argument, cites a number of "examples" of the trial prosecutor "confusing the issues." [Docket No. 11-CV-

303-CAB, Doc. 1-4, pp. 7-20]. He specifically identifies portions of the prosecution's presentation which he contends were irrelevant to the issue of whether he knowingly possessed child pornography. He particularly complains about testimony relating to how the Limewire program is downloaded and used. [Docket No. 11-CV-303-CAB, Doc. 1-4, pp. 7-13].

Petitioner, when he contends this testimony was irrelevant to what he characterizes as the core issue in the case, his knowing possession and attempted receipt of child pornography, fails to recognize the challenged testimony was necessary to provide the jury with a thorough overview and understanding of the technology he used to obtain the child pornography found on his computer. Such testimony was thus clearly relevant and probative.

Petitioner also complains about testimony elicited from Agent Huff about SHA1 values. [Docket No. 11-CV-303-CAB, Doc. 1-4, pp. 13-16]. Petitioner argues this testimony was irrelevant and confusing. The concept of SHA1 values was, however, key to understanding the United States Exhibits 10, 11 and 12, the child pornography files which were part of the June 23, 2006, browse, were, in fact, on Petitioner's computer. [Doc. 159, pp. 14, 15, 52-60].

Petitioner attempts to further his "confuse and waste of time" argument by pointing out portions of the trial transcript which indicate some confusion and communication issues

by the trial prosecutor with witnesses concerning the color coding of some United States exhibits. [Doc. 159, pp. 17-20]. Such "evidence," while it may indicate the trial prosecutor was, at times, at a loss for words, or even a bit disorganized, is wholly insufficient to support relief under § 2255. *United States v. Gordon*, 172 F.3d at 755; *Park v. Raley*, 506 U.S. at 29, 30.

The "confuse and waste of time" argument was apparently not raised at trial nor on appeal, *United States v. Solon*, 596 F.3d at 1208, and thus is procedurally barred. Petitioner has neglected to justify under the well established standards, including a valid ineffective assistance of counsel challenge, his failure to raise this assertion either at trial or on appeal. *United States v. Solon*, 596 F.3d at 1208; *Park v. Raley*, 506 U.S. at 29, 30; *United States v. Allen*, 16 F.3 at 378; *Murray v. Carrier*, 477 U.S. at 492; *United States v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504.

Improper Closing Argument

Petitioner, in his final challenge alleging "prosecutorial misconduct," asserts the trial prosecutor improperly "testified" during his closing argument. [Doc. 159, pp. 38-41]. The challenged remarks cited by Petitioner were, in each instance, fully supported by factual testimony at trial, and a prosecutor, during closing argument, is permitted to comment on facts in evidence and draw reasonable inferences therefrom. *United States v. Dazey*, 403 F.3d

1147, 1170 (10th Cir. 2005); *United States v. Lopez-Medina*, 596 F.3d 716, 739 (10th Cir. 2010).

Petitioner alleges the prosecutor improperly "testified" when he discussed how IP addresses are publicly available and are the means by which computers utilizing the Internet recognize one another. [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 38]. 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 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." [Doc. 157, p. 18]. Petitioner's own expert, Ms. Loehrs, in fact analogized an IP address to the address of a building. [Doc. 158, p. 21]. A statement to the effect an IP address is how computers recognize one another is clearly a fair comment on the evidence.

Petitioner further alleges the prosecutor improperly "testified" during his closing argument by stating it is the files which Limewire introduces to a computer, not the Limewire program itself, which poses a danger. [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 39]. It is, once again, the testimony of Petitioner's own expert, Ms. Lochrs, which justifies the allegedly "improper" closing argument comment. Ms. Lochrs testified the "Zlob" trojan,

which she claimed infected Petitioner's computer "came in through Limewire. I don't know what it attaches itself to. It came in through the games on Limewire." [Doc. 158, p. 96].

Petitioner also argues the trial prosecutor offered testimony concerning open ports on his computer when he stated Ms. Loehrs did not give one specific example of a port on Petitioner's computer which was open and subject to attack. [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 41]. Ms. Loehrs, in her testimony, simply stated a particular port, 43110, was "unassigned," and "could be vulnerable." [Doc. 158, p. 23]. Petitioner has failed to identify any testimony by Ms. Loehrs wherein she concludes port 43110, or any other port, was open and subject to attack. She simply stated, when questioned about an indication a program was being "forced on this [43110] port," "I don't have any explanation for that. I don't have an answer for that." [Doc. 158, p. 23]. Petitioner has failed to present any support for his assertion the trial prosecutor offered testimony on the question of an open port on Petitioner's computer.

Petitioner's final "closing argument" allegation asserts the trial prosecutor improperly testified with regard to the proper functioning of the AVAST anti-virus software present on Petitioner's computer. [Docket No. 11-CV-303-CAB, Doc. 1-4, pp. 46-52]. The comments by the trial prosecutor were, once again, based on facts and evidence present at trial, including testimony by 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.

[Doc. 159, pp. 93, 94].

Agent Huff also testified 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.

[Doc. 159, pp. 169, 170].

The comments by the trial prosecutor to the effect the anti-virus program on Petitioner's computer was working properly are supported by the testimony of Agent Huff.

Petitioner has, in addition, neglected to justify under the well established standards, including a valid ineffective assistance of counsel challenge, his failure to raise this assertion either at trial or on appeal. *United States v. Solon*, 596 F.3d at 1208; *Park v. Raley*, 506 U.S. at 29, 30; *United States v. Allen*, 16 F.3 at 378; *Murray v. Carrier*, 477 U.S. at 492; *United States v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504.

Ineffective Assistance of Trial and Appellate Counsel

> *Violation by trial counsel of Sixth Amendment right to the effective assistance of counsel and my Fifth Amendment right to due process*

Petitioner alleges a violation of his Sixth Amendment right to effective assistance of counsel, as well as his Fifth Amendment right to due process, based on an assertion his trial counsel was ineffective in his investigation of the complexities of Petitioner's case, and was not adequately prepared for trial "within the requisite range of competence needed for a case of this type." [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 53]. He further argues his trial

counsel failed to timely file motions and failed to "subject prosecution's case to meaningful adversarial testing." [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 53].

Failure to File Timely Motions - Ms. Tami Loehrs

Petitioner's first quarrel with the performance of his trial attorney relates to the employment of Ms. Loehrs. He alleges:

> [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.

[Docket No. 11-CV-303-CAB, Doc. 1-4, p. 70].

Petitioner thus argues because his trial counsel failed to request additional funding for Ms. Loehrs, he was constitutionally ineffective. The trial court record, when viewed through the lense of the requirements to establish an ineffective assistance of counsel claim as clearly set out by *Strickland v. Washington*, *Knowles v. Mirzayance*, *Harrington v. Richter*, *United*

States v. Haddock, *Gillette v. Tansy*, *Laycock v. State of New Mexico*, and *Hatch v. State of Oklahoma*, fails to provide any support for Petitioner's allegation.

Petitioner, when he was initially charged, retained counsel (Messrs. Smith and Chapman) who, in turn, hired two experts to review the evidence gathered from the Petitioner's hard drive. [Doc. 163, pp. 4, 7]. Petitioner, on January 3, 2008, three months after he had initially pled guilty, requested his attorney be appointed to represent him at government expense. The Court granted this request. [Doc. 164, pp. 20-24]. The Court thereafter, on January 24, 2008, authorized CJA funds to be expended for the services of one of the computer experts who had previously worked for Petitioner prior to his guilty plea. [Doc. 58, Doc. 59]. The Court, on February 21, 2008, subsequently entered another order authorizing defense counsel to retain a second expert, Ms. Loehrs, to review the United States digital evidence. The Court's order allowed Ms. Loehrs, for her services, to bill $250 an hour, however, her total billing could not exceed $20,000 unless further ordered by the Court. [Doc. 63, Doc. 64].

Ms. Loehrs, after traveling from Tucson, Arizona, to Cheyenne, Wyoming, spent March 12, 13, and 14, 2008, reviewing the United States evidence, after which she submitted a bill on March 20, 2008, by motion through counsel, for an "interim" payment of $10,603.90. [Doc. 69]. The Court, on March 26, 2008, after expressing concern the charges

by Ms. Loehrs "are unusually high," authorized payment of her "interim" bill in full, but struck the initial total authorization of $20,000 for Ms. Loehrs' services. The Court further ordered "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].

Petitioner, in response to the Court's order of March 26, 2008, filed a document on April 1, 2008, entitled "Ex Parte Notice to the Court Regarding Specific Cost Estimate For Expert Services." [Doc. 72]. The Ex Parte Notice asserted Ms. Loehrs' evaluation of the evidence had been very helpful to the defense, that she had stopped her work, and Petitioner would be submitting additional bills from Ms. Loehrs. [Doc. 72]. Petitioner, two days later, on April 3, 2008, filed a Notice of Intention to Withdraw Guilty Plea and proceed to trial. [Doc. 73].

A hearing on Petitioner's motion to withdraw his guilty plea was held April 16, 2008, during which Petitioner's counsel stated the decision by Petitioner to withdraw his plea was based on the work of Ms. Loehrs. [Doc. 163, pp. 7, 8]. Petitioner's counsel, in fact, stated, "*... I think now that we have a proper evaluation of the evidence, we're ready to go to trial.*" [Doc. 163, p. 8 (emphasis added)]. He also did not provide any indication to the Court Ms. Loehrs would need additional time to conduct further analysis of the hard drive from

Petitioner's computer. The Court, at the conclusion of the hearing on Petitioner's request to withdraw his guilty plea, 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.

[Doc. 163, p. 20].

Petitioner, just prior to the hearing on April 16, 2008, to consider his request to withdraw his guilty plea, filed a second "Ex Parte Notice to the Court Regarding Specific Cost Estimate for Expert Services." [Doc. 76]. The Notice informed the Court Ms. Loehrs had performed additional analysis after her trip to Wyoming, for which she was requesting an additional $5,375 in payment for those services. [Doc. 76, Doc. 76-2]. The Notice, while indicating some uncertainty as to what, if any, additional work by Ms. Loehrs might be necessary prior to trial, did seek *authorization for four hours of pre-trial consultation, ten*

hours of travel and expenses to and from Cheyenne for trial, and eight hours a day trial time for the entirety of the Petitioner's trial. [Doc. 76 (emphasis added)].

Petitioner, on May 7, 2008, filed a "Declaration of Tami Loehrs" in which Ms. Loehrs outlines the work she had done up to that time. [Doc. 84-2]. Ms. Loehrs' Declaration, particularly paragraphs 31 through 35, offers no indication she would need any additional time to complete her investigative analysis on behalf of Petitioner. [Doc. 84-2, p. 6].

Ms. Loehrs, on September 17, 2008, testified via video conference at a hearing to discuss her fees and the additional work she might have to perform to prepare for trial.

> 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.

[Transcript, Motion Hearing, September 17, 2008, pp. 50, 51, 52, filed with the Court, October 7, 2008 (emphasis added)]. The testimony by Ms. Loehrs includes no mention of any need for additional time for preparation beyond the ten or even fifteen hours indicated.

The Court, by order dated September 23, 2008, authorized the pretrial preparation time requested by Petitioner, and further agreed to pay Ms. Loehrs to attend and assist the defense at trial, subject to her agreement to charge a reduced hourly rate. The Court also set a trial date of November 8, 2008. [Doc. 96].

Petitioner responded to the Court's September 23rd order by submission, on October 14, 2008, of a document entitled "Filing of Affidavit Pursuant to Court's Order Ruling On

Outstanding Motion and Request for Approval for Hourly Rate." [Doc. 106]. The document indicated Ms. Loehrs had agreed to provide trial services at $150 an hour. The document also requested, in addition to the previously authorized four hours for pre-trial preparation, authorization for 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. [Doc. 106]. The Court granted Petitioner's request on October 22, 2008. [Doc. 111]. It thus appears Ms. Loehrs was satisfied, as of Petitioner's filing on October 14, 2008, she could provide the necessary expert service Petitioner required if she was authorized four hours of pretrial preparation, plus four hours a day in addition to trial time. Such a conclusion is clearly in line with her testimony during the hearing on September 17, 2008. [Transcript, Motion Hearing, September 17, 2008, pp. 50, 51, 52, filed with the Court, October 7, 2008 (emphasis added)]. There was absolutely nothing within the October 14, 2008, document to suggest Ms. Loehrs would need more time than the filing indicated to complete her analysis of the evidence in this case.

Petitioner did not object to any of the Court orders addressing the payment of fees to Ms. Loehrs, nor to the requirement any additional analysis undertaken by Ms. 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 Ms. Loehrs made any assertion she needed more time to complete her work on behalf of Petitioner. She stated, in response to a question about her report by defense counsel on direct examination, "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." [Doc. 161, p. 160].

The exchange noted hereafter then occurred, following a discussion regarding an anti-virus warning log on Petitioner's hard drive:

> 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.

[Doc. 158, p. 40].

The United States immediately objected and requested a sidebar discussion with the Court after which the jury was instructed to disregard Ms. Loehrs' statement about being stopped. [Doc. 158, pp. 40, 41, 42].

Ms. Loehrs, during her testimony at trial, speculated Petitioner's computer was compromised by a virus or trojan which might explain the presence of the child pornography found on the computer. [Doc. 158, p. 110]. When asked, however, on cross-examination, to

specify what virus she was claiming infected Petitioner's computer, Ms. Loehrs stated, "I haven't gotten to investigate." [Doc. 158, p. 96]. Her testimony, however, appears to be in direct contradiction with what she stated under oath in paragraph 31 of her affidavit of May7. 2008:

> 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, p. 6].

Ms. Loehrs, later in her cross-examination by the United States, when asked if there was any report a Zlob trojan had ever resulted in the "mysterious download of child pornography," stated, "Once again, I have not finished my investigation." [Doc. 158, pp. 96, 97]. Ms. Loehrs subsequently basically volunteered how much time she needed to finish her examination of Petitioner's computer and prove her theory of the case, *i.e.*, a hacker downloaded the child pornography to Petitioner's computer: "**And give me about a hundred more hours and I may be able to prove it on this one as well. That is all I'm**

saying." [Doc. 158, p. 98 (emphasis added)]. Ms. Loehrs, however, at the close of her direct testimony, had already opined she might need more than one hundred additional hours for her analysis: "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." [Doc. 158, p. 61 (emphasis added)].

Petitioner, in his appeal to the Tenth Circuit, alleged the trial court abused its discretion in not granting additional funding to allow Ms. Loehrs to continue her work on his case. The Tenth Circuit rejected this argument, specifically finding the district court had granted each of the funding requests made by Petitioner.

> Here, the district court did not abuse its discretion, because, as the government points out, the district court never actually denied a funding request. Indeed, the district court granted the only funding request Mr. Solon made. Therefore, Mr. Solon's argument necessarily fails. Furthermore, § 3006A(e)(3) expressly provides a district court with the discretion to determine whether high costs are "fair compensation for services of unusual character or duration." In this case, the defense expert, Ms. Loehrs, submitted a bill of more than $10,000 for three days of work. The district court, understandably concerned by the high costs, altered its earlier approval of expenses and required Ms. Loehrs to provide the court with an "affidavit itemizing expenses incurred on behalf of [Mr. Solon] prior to ... preauthorization of expert expenses." This change was intended to provide the court with a chance to

> "scrutinize and approve reasonable expenses incurred," and is consistent with the district court's discretion to approve expert fees under § 3006A(e)(3).

United States v. Solon, 596 F.3d at 1210.[11]

Petitioner now argues his trial counsel "ineffectively failed to file timely motions to request funding for an effective investigation," thus "Ms. Loehrs was unable to complete her investigation, which was crucial to my defenses." [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 70]. Such an assertion fails to consider, however, the fact it was during the fifth day of a six day trial when Ms. Loehrs announced she might need "hundreds" of hours of additional time to work on Petitioner's case. [Doc. 158, p. 61]. It also fails to take into account the fact Ms. Loehrs, during a September 17, 2008, hearing, some six weeks before the start of trial, stated she might need five to ten hours of additional time to analyze Petitioner's computer. [Transcript, Motion Hearing, September 17, 2008, pp. 50, 51, 52, filed with the Court, October 7, 2008]. It is also important to note Petitioner's filing on October 14, 2008, seeking funding for Ms. Loehrs, contains absolutely no indication she might need a hundred or more hours to continue her analysis of the evidence in this case. [Doc. 106].

---

[11] The authorized payments to Ms. Loehrs totaled $22,880.84. [Doc. entry dated May19, 2008 - $10,603.90, and Doc. entry January 30, 2009 - $12, 276.94].

In light of the sworn statements by Ms. Loehrs prior to trial, there is nothing to suggest she ever conveyed to trial counsel, or anyone else for that matter, she would need a hundred or more hours to complete her work for Petitioner. The voluminous record before the Court completely lacks any support for the notion trial counsel ignored any requests by Ms. Loehrs to obtain authorization for additional work or funding. It was only during her trial testimony, when asked about her analysis of Petitioner's computer, that Ms. Loehrs stated her assertion she needed a hundred or more additional hours to work on Petitioner's case.

The Tenth Circuit, in affirming Petitioner's conviction, stated "[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). Petitioner, through the efforts of trial counsel, was afforded the basic and integral tools necessary to mount a defense. Trial counsel sought and employed not one, but, in total, three computer experts on behalf of Petitioner, two of whom, Ms. Loehrs and Robert Reilly, testified on behalf of Petitioner at trial. [Doc. 161, pp. 127-144]. Petitioner has failed, based on the record before the Court, to even minimally support an assertion his trial counsel was constitutionally ineffective in regards to his employment of Ms. Loehrs.

Even accepting the conclusion, for purposes of discussion, the action of trial counsel in regards to his employment of Ms. Loehrs somehow fell below that "broad range of reasonable professional competence" required by *Strickland v. Washington*, Petitioner has completely failed to establish any required resulting prejudice. Ms. Loehrs testified, "And give me about a hundred more hours and I **may** be able to prove it . . . .," [Doc. 158, p. 98 (emphasis added)], the "it" being the fact the child pornography on Petitioner's computer had been placed there by someone other than Petitioner. Ms. Loehrs statement is, at best, speculation, and speculation alone, is not sufficient to establish prejudice under the *Strickland v. Washington* standard which requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. at 694; *United States v. Boone*, 62 F.3d 323, 327 (10th Cir. 1995).

Failure to Retain Services of Other Experts

Petitioner next argues his trial counsel was constitutionally ineffective by failing to retain at least three additional experts to testify on his behalf. He asserts his trial counsel should have located and employed (a) an expert in computer malware such as Trojans; (b) an expert to give a live, in-court demonstration to establish a Trojan existed on his computer

system; and (e) an expert in child pornography who would testify as to the characteristics of those who collect child pornography. [Docket No. 11-CV-303-CAB, Doc. 1-4, pp. 71, 72].

The language of the Tenth Circuit decision affirming Petitioner's conviction is equally applicable to his current allegation. "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, quoting *United States v. Kennedy*, 64 F.3d 1465, 1473 (10th Cir. 1995). The Tenth Circuit, in the context of an ineffective assistance of counsel claim, has stated the decision by trial counsel with regard to the presentation of expert testimony is a strategic decision. *United States v. Maxwell*, 966 F.2d 545, 548-549 (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 853, 859 (10th Cir. 2005); *Bradley v. Suthers*, 449 Fed. Appx. 722, 725 (10th Cir. 2011).

Petitioner, now through the prism of hindsight, and relying on nothing more than the pure conjecture of Ms. Loehrs, offers only unsubstantiated general declarations his trial

counsel should have hired more experts. [Docket No. 11-CV-303-CAB, Doc. 1-4, pp. 70, 71, 72]. He fails to identify any specific expert who should have been employed on his behalf, and, while he does provide in very general terms the tenor of the testimony he would hope another expert might provide, no where in his pleadings is there any indiction such experts he would have sought even exist, or would have testified on his behalf. The allegation trial counsel should have - or could have - retained the experts suggested by Petitioner is speculative at best, and is nothing more, in reality, than second-guessing of defense strategy. Such contention is wholly lacking in merit.

Failure to Object to Trial Judge Leaving the Courtroom

Petitioner next urges his trial counsel was constitutionally ineffective based on a failure to object when the trial judge left the courtroom during closing arguments. [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 72]. The merits of this issue were raised on direct appeal in the form of an assertion alleging structural error. The Tenth Circuit, however, rejected the notion the actions of the trial judge constituted structural error, nor did such action encompass plain error. The Court specifically stated Petitioner had not satisfied the requirement of showing that "but for" the complained of error, *i.e.*, the trial judge leaving the courtroom during closing argument, the outcome of the trial would have been different. *United States v. Solon*, 586 F.3d at 1212-1213. The Court further stated:

> Additionally, the government's case was strong. [Petitioner's] computer was observed online offering child pornography for download on June 23 and August 9, 10, and 11, 2006. A search of [Petitioner'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, [Petitioner] admitted to using Limewire on September 20 to attempt to download two computer games. Additionally, the government presented evidence that [Petitioner] 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, [Petitioner] has not established a reasonable probability that, but for the judge's absence, the jury would not have convicted him.

United States v. Solon, 586 F.3d at1213. It is axiomatic an issue once litigated and resolved on direct appeal may not be re-litigated in a § 2255 proceeding, 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); *United States v. Taylor*, 492 Fed. Appx. 941, 943, 944 (10th Cir. 2011). The Tenth Circuit having considered and rejected, on direct appeal, the claim the trial judge's absence from the courtroom was error, and Petitioner having failed to identify any intervening change in the law which would result in a different and more favorable disposition of the matter, this claim is rejected.

Failure to Object to Prosecutorial Misconduct

The next claim by Petitioner alleges his trial counsel was ineffective when he failed to keep "the focus of the trial on the main issue in question: Did I knowingly possess and receive child pornography?" [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 72]. Petitioner's sole support for this assertion argues his trial counsel "failed to object to most of [the trial prosecutor's] misconduct," and simply references Petitioner's prior argument relating to such alleged misconduct. Those argument by Petitioner have been fully and completely addressed, with one exception, thus further elaboration is not necessary. *Supra*.

The one exception relates to the alleged ineffectiveness of his trial counsel who "failed to object in closing argument to the repeated outright lies by [the trial prosecutor] concerning the testimony of my expert witness, Ms. Loehrs." [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 73]. This issue was not raised by Petitioner in his direct appeal, thus it may only be considered in light of an ineffective assistance of counsel claim. *United States v. Solon*, 596 F.3d at 1208; *Park v. Raley*, 506 U.S. at 29, 30; *United States v. Allen*, 16 F.3 at 378; *Murray v. Carrier*, 477 U.S. at 492; *United States v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504.

The United States, in its response to Petitioner's motion to vacate, candidly agrees the trial prosecutor did, in fact, misstate evidence during his closing argument. The prosecutor, on at least three occasions during his closing, incorrectly stated Ms. Loehrs did not find any

child pornography on Petitioner's hard drive. Ms. Loehrs in fact stated she did not find "images" of child pornography, meaning still pictures. She did, however, inform the jury she found digital video clips constituting child pornography. The trial prosecutor also incorrectly stated Ms. Loehrs testified the child pornography on the hard drive was not viewable. Ms. Loehrs actually indicated she found no forensic evidence the child pornography on the hard drive had ever been viewed. She did not assert it was not "viewable." [Doc. 15, pp. 36, 37].

The Ninth Circuit has held, "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 v. Washington*, 466 U.S. at 689. An attorney, as a strategic decision, may choose not to object during and opening or closing argument, even though an objection would likely be sustained, having concluded repeated objections may have an adverse impact on a jury. *Johnston v. Love*, 940 F.Supp. 738, 754 (E.D. Pa.1996) (a failure to object to prosecutor's comments in closing argument was a matter of trial strategy, and was not an instance of ineffective assistance of counsel). *United States v. Lively*, 817 F. Supp. 453, 466 (D. Del. 1993), aff'd, 14 F.3d 50 (3d Cir. 1993) ("Because many lawyers refrain from objecting during opening and closing argument, 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.") The Tenth Circuit has, in addition, concluded the failure or reluctance of a defense attorney to object when a prosecutor misstates the law or evidence during a closing argument, in and of itself, particularly in light of other ample evidence to support a jury verdict, is not ineffective assistance of counsel. *Miller v. Mullin*, 354 F.3d 1288, 1299 (10th Cir. 2004).

Even presuming, for purposes of discussion, the alleged failure by Petitioner's trial counsel to object to the prosecutor's misstatements constituted deficient performance, Petitioner has not, and arguably cannot, in light of the facts before the Court, establish "prejudice" under the *Strickland v. Washington* standard, *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 have been different.

Petitioner was not prejudiced by any alleged deficient performance by his trial counsel for at least three reasons. First, the trial court's jury instructions minimized the impact of the prosecutor's misstatements. *Thornburg v. Mullin*, 422 F.3d 1113, 1134 (10th Cir. 2005) (explaining a judge's instructions 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"). Jury instructions are important when considering prosecutorial misstatements since "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); *Parks v. Saffle*, 925 F.2d 366, 370 (10th Cir. 1991); *Bland v. Sirmons*, 459 F.3d 999, 1015 (10th Cir. 2006). The jury, during Petitioner's trial, was instructed on five separate occasions to the effect comments of counsel were not evidence. [Doc. 157, p. 3; Doc. 160, pp. 49, 51, 58, 67.)

The second reason Petitioner was not prejudiced by any alleged deficient performance by his trial counsel with regard to the prosecutor's misstatements lies in the fact his counsel, during his closing argument, identified for the jury the mistakes contained in the prosecutor's argument. Petitioner's counsel quite properly noted Petitioner was not contesting the presence of child pornography on his computer. [Doc. 160, pp. 28-48]. He also noted the major difference between the testimony of Ms. Loehrs and the United States expert, Agent Huff, was not whether the files were viewable, but rather whether the files had ever been viewed. [Doc. 160, p. 29].

The final reason Petitioner can not show prejudice stems from the conclusion by the Tenth Circuit the United States evidence against Petitioner was properly characterized as

"strong." *United States v. Solon*, 596 F.3d at 1213. The case against Petitioner was simply not one where the misstatements by a prosecutor in a closing argument could logically be considered as influencing or affecting the trial outcome.

Failure to Object to Data from Hard Drive

Petitioner next alleges his trial counsel:

> 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.

[Docket No. 11-CV-303-CAB, Doc. 1-4, p. 73 (footnote omitted)].

Petitioner, other than the quoted statement, offers absolutely nothing by way of cogent argument or authority in support of his assertion, thus his claim must be denied. *Hatch v. State of Oklahoma*, 58 F.3d at 1457 (allegations must be "specific and particularized"); *United States v. Fisher*, 38 F.3d at 1147 (reviewing court is "not required to fashion Defendant's arguments for him where his allegations are merely conclusory in nature and without supporting factual averments.)

Petitioner's claim, in addition, totally lacks any factual basis. Agents Balliett and Huff clearly adhered to proper forensic procedure in seizing, transporting, and examining the hard drive from Petitioner's computer. [Doc. 15-1].

Failure to Object When Hard Drive Not Introduced as Evidence

Petitioner also claims his trial counsel was ineffective because he "didn't challenge the fact that the hard drive itself was not introduced as evidence." [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 73]. Petitioner once again offers no analysis or authority for his assertion, thus this claim is, as well, without merit. *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); *Hatch v. State of Oklahoma*, 58 F.3d at 1457 (allegations must be "specific and particularized"); *United States v. Fisher*, 38 F.3d at 1147 (reviewing court is "not required to fashion Defendant's arguments for him where his allegations are merely conclusory in nature and without supporting factual averments.) Petitioner's allegation is, as well, rendered moot by the previous discussion concluding the fact the physical hard drive was not introduce introduced into evidence was not error. *Supra*.

Violation by appellate counsel of Sixth Amendment right to the effective assistance of counsel and Fifth Amendment right to due process

Petitioner next alleges his appellate attorney was constitutionally deficient in her representation. He alleges "[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 . . ." [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 74]. This allegation by Petitioner, however, as with his prior arguments, is not supported by any enlightening analysis of the alleged ineffectiveness, nor by any explanation of how such ineffectiveness resulted in prejudice to Petitioner under the standards established by *Strickland v. Washington*. This failure alone is sufficient to render meritless any "ineffectiveness" allegation against appellate counsel. *Hatch v. State of Oklahoma*, 58 F.3d at 1457; *United States v. Fisher*, 38 F.3d at 1147. A discussion of each assertion by Petitioner is, nevertheless, appropriate.

The Tenth Circuit has concluded "[a]lthough *Strickland* set forth standards for determining the effectiveness of trial counsel, we have applied those same standards in assessing the effectiveness of appellate counsel." *United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995); *United States v. Fabiano*, 42 Fed. Appx. 408, 413 (10th Cir. 2002.). A claim of appellate ineffectiveness "can be based on counsel's failure to raise a particular issue on appeal, although it is difficult to show deficient performance under those circumstances

because counsel '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.'" *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003)(quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000). An indigent defendant does not, as well, have "a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Appellate counsel is entitled to use her professional judgment to determine which points best deserve attention in appellate briefs. *Jones v. Barnes*, 463 U.S. at 750-754. And while it is possible to bring an ineffective assistance claim based on appellate counsel's failure to raise a particular issue, "it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

A court, in order to evaluate the performance of appellate counsel, must "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." *Cargle v. Mullin*, 317 F.3d at 1202. Conversely, "if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of 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." *Cargle v. Mullin*, 317 F.3d at 1202. (citing *Smith v. Robbins*, 528 U.S. at 288).

Failure to Argue Prosecutorial Misconduct and Ineffectiveness of Trial Counsel

Petitioner alleges 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." [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 74]. This allegation by Petitioner, once again, lacks the support of any enlightening analysis of the alleged ineffectiveness, or any explanation of how Petitioner was prejudiced under the standards established by *Strickland v. Washington*. This failure alone is sufficient to render meritless this "ineffectiveness" allegation. *Hatch v. State of Oklahoma*, 58 F.3d at 1457; *United States v. Fisher*, 38 F.3d at 1147. Petitioner's allegation is, as well, rendered moot by the extensive previous discussion concluding basically there was no prosecutorial misconduct at trial. S*upra*.

Petitioner further alleges appellate counsel was ineffective when she failed to advance an ineffective assistance of trial counsel argument in the direct appeal. Such an argument on appeal would have been summarily rejected by the Tenth Circuit."Ineffective 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); *United States v. Kirkley*, __ Fed. Appx. ____, 2013WL1200289 *4 (10th Cir. 2013). Petitioner offers no justification for ignoring this well established rule.

Failure to Seize His Entire Computer System

Petitioner next contends appellate counsel was ineffective because she failed to challenge on appeal the fact his entire computer system had not been seized. [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 74, 75, 76]. Petitioner, in support of this contention, simply quotes from a memorandum filed by his trial counsel in support of a motion to dismiss [Doc. 16. p. 4], and 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." [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 76 (footnotes omitted)]. Petitioner provides nothing by way of analysis nor is there any attempt to cite supporting case authority from the Tenth Circuit, or any other circuit. His claim is conclusory at best, and fails to provide any enlightening analysis of the alleged ineffectiveness nor any explanation of how such ineffectiveness resulted in prejudice to him

under the standards established by *Strickland v. Washington*. This failure, in and of itself, is sufficient to render meritless this "ineffectiveness" allegation. *Hatch v. State of Oklahoma*. 58 F.3d at 1457; *United States v. Fisher*, 38 F.3d at 1147.

Petitioner's argument, even presuming for purposes of discussion it has been properly presented, fails on its merits, or possibly more accurately, fails for lack of any merit.

Petitioner's trial counsel, on April 13, 2007, filed a motion to dismiss the indictment against him for denial of due process based upon the failure of the United States to seize the entire computer system. [Doc. 15]. Petitioner argued such failure constituted a due process violation based upon the holding in *California v. Trombetta*, 467 U.S. 479 (1984). The United States filed a response, after which a hearing was held May 30, 2007. [Doc. 17, Doc. 22]. The Court, after considering the proffers and argument of counsel, denied Petitioner's motion, and stated:

> 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 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].

Appellate counsel, in order to challenge the denial of Petitioner's motion on appeal, would have to establish it was "clear error" to conclude the United States did not destroy potentially exculpatory evidence. *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). "[P]ointing 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, 1161-1162 (10th Cir. 2007)(quoting *Watson v. United States*, 485 F.3d 1100, 1108 (10th Cir. 2007). Any appeal of the order denying Petitioner's motion to dismiss would clearly fail to meet the required "clear error" standard.

The United States Supreme Court, in *California v. Trombetta*, concluded 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. *California v. Trombetta*, 467 U.S. at 488. Evidence, to be constitutionally material under *Trombetta*, must (1) "possess an exculpatory value that was apparent [to law enforcement] 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." *California v. Trombetta*, 467 U.S. 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).

Missing evidence with exculpatory value which is either indeterminate, or only "potentially useful," requires a defendant show the government acted in "bad faith" in destroying the evidence. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). "[M]ere negligence on the government's part in failing to preserve such evidence is inadequate for a showing of bad faith." *United States v. Bohl*, 25 F.3d at 912. *See also, Montgomery v. Greer*, 956 F.2d 677, 681 (7th Cir. 1992) (accidental loss of photographs "unprofessional" and negligent, but "mere negligence, without more, does not amount to a constitutional violation.")

The trial court properly concluded the United States had not destroyed any evidence, and any thought evidence of exculpatory value had somehow been destroyed because Petitioner's entire computer had not been seized is, at best, pure speculation. Agent Huff testified at trial why the entire computer system had not been seized:

> 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.

[Doc. 159, pp. 84, 85]. The testimony by Agent Huff clearly does not contain even a hint of "bad faith."

Neither the record before the Court nor any relevant legal authority even remotely support a finding the conclusion the United States did not destroy potentially exculpatory evidence was clearly erroneous. The record further fails to support any conclusion Agent Huff acted in bad faith when he decided not to seize Petitioner's entire computer system. With these conclusions as background, it is further obvious Petitioner's appellate counsel was not deficient, was not ineffective, when she failed to raise this issue on appeal.

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

The next complaint Petitioner levels against his appellate attorney concerns her decision not to argue on appeal that it was error to admit into evidence at trial the images of child pornography found on Petitioner's hard drive. [Docket No. 11-CV-303-CAB. Doc. 1-4, p. 76]. The sole support presented by Petitioner for this allegation is contained in just two paragraphs:

> 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 of the 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.

[Docket No. 11-CV-303-CAB, Doc. 1-4, p. 76 (footnote omitted)].

The quoted two paragraphs are obviously not sufficient to establish a cognizable ineffective assistance of appellate counsel claim as they address neither of the two elements, deficient performance and prejudice, required by *Strickland v. Washington*. *Hatch v. State of Oklahoma*, 58 F.3d at 1457; *United States v. Fisher*, 38 F.3d at 1147. Petitioner's allegation is, as well, rendered moot by the extensive previous discussion concluding admission of the images was not error. S*upra*.

Failure to Argue There Was Insufficient Evidence to Convict

Petitioner, in his fourth contention relating to the alleged ineffectiveness of his appellate counsel, asserts a "sufficiency of evidence" argument should have been included within his direct appeal. [Docket No. 11-CV-303-CAB, Doc. 1-4, p. 78]. His sole support

for this claim is the quotation of a portion of the transcript of the Rule 29 motion for judgment of acquittal by his trial attorney at the close of the United States case-in-chief. [Docket No. 11-CV-303-CAB, Doc. 1-4, pp. 76, 77]. Petitioner once again fails to develop any additional argument, or offer any analysis, as to why his appellate counsel was deficient for failing to include this argument within the direct appeal. A claim of appellate ineffectiveness "can be based on counsel's failure to raise a particular issue on appeal, although it is difficult to show deficient performance under those circumstances because counsel '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.'" *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003)(quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000). The portion of the trial transcript quoted by Petitioner, being accompanied by no other supporting argument or analysis, is clearly not sufficient to establish a cognizable ineffective assistance of appellate counsel claim pursuant to the two elements required by *Strickland v. Washington*. *Hatch v. State of Oklahoma*, 58 F.3d at 1457; *United States v. Fisher*, 38 F.3d at 1147.

Failure to Argue Exhibits 10, 11, 12 Should Not Have Been Admitted into Evidence

Petitioner next argues his appellate attorney should included within the confines of his direct appeal a challenge to the decision by the trial court to admit United States Exhibits 10, 11, and 12, the images of child pornography captured during the June 23, 2006, browse of his computer by ICAC agents. [Docket No. 11-CV-303-CAB, Doc. 1-4. p. 78, 79]. This is the same issue he raised within the context of his assertions his trial counsel was constitutionally ineffective. *Supra*. Petitioner, however, as he has repeatedly done in the context of his § 2255 motion, has failed to offer any support for his contention, now made a second time, with regard to the noted exhibits of child pornography images. The quotation of 16 lines of trial transcript, without even a hint of analysis or cogent argument, is obviously not sufficient to establish a cognizable ineffective assistance of appellate counsel claim under *Strickland v. Washington*. *Hatch v. State of Oklahoma*, 58 F.3d at 1457; *United States v. Fisher*, 38 F.3d at 1147. Petitioner's allegation is as well rendered moot by the extensive previous discussion concluding admission of the images was not error. *Supra*.

Illegal Search and Seizure

Petitioner, in his § 2255 motion, 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." [Docket No. 11-CV-303-CAB, Doc. 1, p. 16]. He expands on this claim in his memorandum filed in support of his motion.

> 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.

[Docket No. 11-CV-303-CAB, Doc. 1-1, p. 12].

The core of Petitioner's argument, as gleaned from his conclusory statements Agents Balliett and Huff acted in bad faith; from his extensive quotations from the trial transcript; and from his citation to a United States Department of Justice Handbook, "Use of Computers in the Sexual Exploitation of Children," December 2006, edition, alleges, quite simply, the United States should have seized his entire computer system. [Docket No. 11-CV-303-CAB, Doc. 1-4, pp. 80-86, Doc. 1-1, pp. 1-11]. And while the United States Department of Justice Handbook arguably does encourage investigators to seize "the entire computer system to replicate the suspect's use of it and to analyze that use," [Docket No. 11-CV-303-CAB, Doc.

1-4, p. 82], Petitioner completely fails to offer any cogent argument as to how and why the failure to seize his complete computer system constituted "a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure." *United States v. Gordon,* 172 F.3d 753, 755 (10th Cir. 1999) (internal quotations omitted).

Petitioner, in addition, and perhaps more importantly, neglected to raise this issue in his direct appeal, thus he is procedurally barred from raising it within the confines of a § 2255 motion, absent an allegation of ineffective assistance of counsel, an allegation which has been previously found wanting. *Supra. United States v. Allen*, 16 F.3d at 378; *U.S. v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504; *United States v. Solon*, 596 F.3d at 1208.

Lost and Destroyed Evidence

Alleged Mishandling of Hard Drive

Petitioner 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."

[Docket No. 11-CV-303-CAB, Doc. 1-1, p. 13].

Petitioner essentially suggests Agent Huff, on September 22, 2006, damaged or destroyed evidence when he examined the Maxtor hard drive from Petitioner's computer without having connected the drive to a write block device [Docket No. 11-CV-303-CAB, Doc. 1-1, pp. 13-19].

Petitioner, as support for this allegation, simply cites a portion of the trial testimony by Agent Huff:

> 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.

[Doc. 159, pp. 85, 86].

Agent Huff did not mention, in this segment of his testimony, the use of a write-block when imaging the hard drive from Petitioner's computer, thus Petitioner simply assumes the worst, *i.e.*, Agent Huff did not use a write-blocker. Petitioner's assumption is incorrect. The affidavit by Agent Balliett/Bailey submitted with the United States response clearly states

Agent Huff did , in fact, utilize a write-block device when he imaged Petitioner's hard drive to ensure the digital evidence on that drive would not be altered. [Doc. 15-1, p. 2, ¶ 6]. Ms. Balliett/Bailey's affidavit simply confirms what Agent Huff had testified at trial was standard forensic examination practice.

> Q. All right. Let's talk about forensic examinations and what you just talked about. What is the forensic -- how do you conduct a forensic exam of a computer?
> A. You have to have a computer to work from. What we do is we take an evidence hard drive and we do a bit-by-bit transfer of all the media, of all the electronic data, the digital data that's stored in that hard drive. And we transfer that from the suspect hard drive to our forensic hard drive computer.
> But we also place what's called a write-block device. That write-block prevents me or my computer from writing any additional information on that suspect computer. We don't want to change any, add any or delete any evidence on that suspect hard drive, so this process takes hours, sometimes, depending on the size of the hard drive.

[Doc. 159, p. 86].

Petitioner has provide absolutely no support for his assertion evidence was altered or compromised in any manner by the actions of Agent Huff, nor for his implied assertion Agent Huff somehow caused child pornography to be transferred to the hard drive of his computer. [Docket No. 11-CV-303-CAB, Doc. 1-1, p. 19].

Petitioner, in addition, and perhaps more importantly, neglected to raise this issue in his direct appeal, thus he is procedurally barred from raising it within the confines of a § 2255 motion, absent an allegation of ineffective assistance of counsel, an allegation which has been previously found wanting. *Supra. United States v. Allen*, 16 F.3d at 378; *United States. v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538U.S. at 504; *United States v. Solon*, 596 F.3d at 1208.

Failure to Seize Modem/Router

Petitioner next alleges Agents Huff and Balliett should have seized the modem/router connected to his computer. "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." [Docket No. 11-CV-303-CAB, Doc. 1-1, p. 20]. He, once again, failed to raise this issue in his direct appeal, thus he is procedurally barred from raising it within the confines of a § 2255 motion, absent an allegation of ineffective assistance of counsel, which he has not raised. *United States v.* Allen, 16 F.3d at 378; *United States. v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538U.S. at 504; *United States v. Solon*, 596 F.3d at 1208.

Petitioner's assertion, even if couched within an argument of ineffective assistance of counsel, clearly lacks any merit. Ms. Loehrs, his expert, testified she believed the

modem/router could contain information such as "IP addresses, port numbers, passwords, user names, configuration settings." [Doc. 158, p. 56]. Agent Huff also testified the modem/router might contain useful information, however, the information is lost when the system is turned off. [Doc. 161, p. 45]. Thus, while the modem could "possibly" have contained valuable information, Petitioner fails to explain how such information might have been useful to him. Petitioner, at best, offers only speculation as to whether there was any information in the volatile memory of the modem/router, and whether it might have been "useful" to him. Indeed, it is just as reasonable to speculate the "lost" information might have damaged his 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"). Speculation cannot be the basis for relief in a § 2255 proceeding. *United States v. Boone,* 62 F.3d at 327 ("speculation ... cannot establish prejudice").

Failure to Seize Entire Computer System

Petitioner, for the third time, complains, in effect, it was error for the United States to fail to seize his entire computer system. [Docket No. 11-CV-303-CAB, Doc. 1-1, pp. 22-30]. Petitioner, once again, completely fails to offer any cogent argument as to how and why

the failure to seize his complete computer system constituted "a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure." *United States v. Gordon,* 172 F.3d 753. 755 (10th Cir. 1999) (internal quotations omitted).

Petitioner, in addition, neglected to raise this issue in his direct appeal, thus he is procedurally barred from raising it within the confines of a § 2255 motion, absent an allegation of ineffective assistance of counsel, an allegation which has been previously found to be without merit. *Supra. United States v.* Allen, 16 F.3d at 378; *U.S. v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504; *United States v. Solon*, 596 F.3d at 1208.

Deprivation of Right to Confront "Witnesses"

Petitioner's final allegation relying upon the failure by the United States to seize his entire computer system asserts such failure deprived him of the right to "confront the witnesses against me." [Docket No. 11-CV-303-CAB, Doc. 1-1, pp. 31, 32]. Petitioner 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.

[Docket No. 11-CV-303-CAB, Doc. 1-1, p. 32].

Petitioner, once again, totally fails to offer any cogent argument as to how and why the failure to seize his complete computer system constituted "a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure." *United States v. Gordon*, 172 F.3d 753, 755 (10th Cir. 1999) (internal quotations omitted).

This issue as well, was not raised by Petitioner in his direct appeal, thus he is procedurally barred from raising it within the confines of a § 2255 motion, absent an allegation of ineffective assistance of counsel, an allegation which has been previously found to be without merit. *Supra. United States v. Allen*, 16 F.3d at 378; *U.S. v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504; *United States v. Solon*, 596 F.3d at 1208.

Indictments

Petitioner, in a portion of his § 2255 motion and accompanying memorandum addressing the indictments against him, raises four "Challenges." Each "challenge" is, as a

practical matter, simply a variation of his previous arguments asserting the evidence presented at trial by the United States was not sufficient to support his conviction on the crime charged, or the evidence he, Petitioner, introduced, established a reasonable doubt as to his guilt.

CHALLENGE I

I challenge that the Government did not have sufficient evidence that I KNOWINGLY possessed and KNOWINGLY attempted to receive child pornography as charged in the Superseding Indictment. In fact, I challenge that the Government did not have ANY evidence against me that I KNOWINGLY committed this crime

CHALLENGE II

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 write-block device.

CHALLENGE III

I challenge my conviction based upon the repeated accusation that I used "search terms" to download child pornography. The following testimony indicates that the Prosecution's Forensic Computer Expert did not even know how to locate what "search terms" had been entered into my computer

CHALLENGE IV

> I challenge my conviction on the basis of Government Exhibit 39, the AVAST (Anti-Virus Software) Report from my computer, which confirmed my computer was infested with viruses and Trojans that allowed my computer to be open to someone remotely accessing it without my knowledge. The fact there is no proof that I knowingly committed this crime, along with the fact that malware was present on my computer, which made my computer vulnerable to hackers, is a combination that creates more than enough reasonable doubt.

[Docket No. 11-CV-303-CAB, Doc. 1, p. 37; Doc. 1-1, pp. 33-68]. Petitioner failed, however, to raise any of these four "challenges" in his direct appeal, thus he is once again procedurally barred from raising any of them within the confines of a § 2255 motion, absent an allegation of ineffective assistance of counsel, an allegation which has been previously found to be without merit. *Supra. United States v. Allen*, 16 F.3d at 378; *U.S. v. Cook*, 45 F.3d at 392; *Massaro v. United States*, 538 U.S. at 504; *United States v. Solon*, 596 F.3d at 1208. It has, in addition, been established for some time in the Tenth Circuit that a motion under 28 U.S.C. § 2255 is not a substitute for a direct appeal, and a prisoner cannot use such motion as a vehicle to challenge the sufficiency of the evidence used to convict him. *Payton v. United States*, 436 F.2d 575, 576-577 (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); *United States v. Aragon-Pando*, _____ Fed. Appx. ___, 986 F.2d 1430, 1430 (10th Cir. 1993).

A § 2255 claimant may, of course, raise a claim 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). Petitioner has previously raised such claims in the context of his motion, and the same have been found lacking. *Supra*. Any claims or assertions which Petitioner has attempted to raise in the context of the challenges to the indictments which were not considered as part of his ineffective assistance of counsel claims simply cannot be considered. *Payton v. United States*, 436 F.2d at 576-577.

Petitioner's "sufficiency of the evidence" allegation, even if considered as a distinct and separate issue in the context of his challenge to the indictments, is clearly without merit.

Whether there is sufficient evidence produced at trial to prove a defendant's guilt beyond a reasonable doubt is a question of law which the Tenth Circuit reviews *de novo*. *United States v. Acosta-Gallardo,* 656 F.3d 1109, 1123 (10th Cir. 2011); *United States v. Wardell*, 591 F.3d 1279, 1286-1287 (10th Cir. 2009). The Court, in conducting its review, will "[consider] both direct and circumstantial evidence, and all reasonable inferences therefrom, in the light most favorable to the government." *United States v. Acosta-Gallardo*, 656 F.3d at1123 (quoting United *States v. Wardell*, 591 F.3d at 1287; *United States v.*

McIntosh, __ Fed. Appx. ___, 2013 WL1490849 *2, 3 (10th Cir. 2013). The Court, through its review, "may not disturb the jury's credibility determination, nor weigh the evidence" in performing this analysis. *United States v. Acosta-Gallardo*, 656 F.3d at1123 (citing *United States v. Wardell*, 591 F.3d at 1287. The evidence is sufficient under these tests if a rational jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Acosta-Gallardo*, 656 F.3d at1123 (citing *United States v. Wardell*, 591 F.3d at 1286, 1287).

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*, 672 F.3d 948, 955 (10th Cir. 2012). The Court in *Haymond* stated, "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.'" *United States v. Haymond*, 672 F.3d at 955, citing *United States v. Dobbs*, 629 F.3d 1199, 1207 (10th Cir. 2011). "In other words, the 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*.' To convict [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." *United States v. Haymond*, 672 F.3d at 955, citing *United States v. Dobbs*, 629 F.3d at 1207 (emphasis in original).

The United States evidence presented at trial unquestionably fulfilled the requirements set out in *Haymond*. The Tenth Circuit described the United States evidence as "strong." *United States v. Solon*, 596 F.3d at 1213. The Court, in summarizing the "strong" evidence, 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.

United States v. Solon, 596 F.3d 1213.(emphasis supplied).

There was presented at trial, in addition to the evidence cited by the Tenth Circuit, further evidence, which when viewed in a light most favorable to the United States, established Petitioner used his computer to view files with names consistent with child pornography in June, July, August, and September, 2006. [Docket No. 11-CV-303-CAB, Doc. 15-2]; [Doc. 159, pp. 153, 154, 155). The United States also introduced a time line of

the downloads which clearly established Petitioner downloaded and previewed child pornography files on September 20, 2006. [Docket No. 11-CV-303-CAB, Doc. 15-3].

Petitioner contended at trial he was not responsible for the child pornography found on his computer. The theory of his defense was grounded on an assertion his computer was vulnerable to attack, and some type of malware had allowed a third party - a hacker - to place the child pornography on his computer. He continues this assertion in the context of his § 2255 motion wherein he insists the evidence revealed his computer was "infested" with viruses. [Docket No. 11-CV-303-CAB, Doc. 1, pp. 22, 37; Doc. 1-1, pp. 57-68]. The testimony of Agent Huff, the United States computer expert, directly contradicted Petitioner's assertion. Agent Huff testified Petitioner's computer was equipped with anti-virus software which was working properly. He further indicated there were no active viruses on Petitioner's computer, and the malware identified by Ms. Loehrs had been recognized and deleted by the anti-virus software. [Doc. 159, pp. 93, 94, 121, 162, 169-173).

The strength of the evidence presented at trial was more than sufficient to allow a rational jury to find Petitioner guilty beyond a reasonable doubt.

Jury Prejudice

Petitioner, in his final § 2255 challenge, essentially reprises his earlier arguments concerning the alleged "bad faith" and prejudicial conduct by the trial prosecutor. [Docket

No. 11-CV-303-CAB, Doc. 1-1, pp. 72-76]. He further claims he was victim of unfair prejudice created by the conduct of his trial attorney and the judge, as well as by the trial judge striking the testimony of Ms. Loehrs when she stated her work had been "stopped" by the Court. [Docket No. 11-CV-303-CAB, Doc. 1-1, pp. 76, 77].

The allegations with regard to the "bad faith" and prejudicial conduct raised by Petitioner have been previously discussed in some detail, and found to be without merit. *Supra*. In addition, the alleged prejudice Petitioner argues the trial court created by striking the testimony of Ms. Loehrs when she stated her work had been "stopped" by the Court, and then leaving the bench during defense counsel's closing argument, was an integral part of Petitioner's direct appeal on the issue of structural error, an issue which the Tenth Circuit found to be without merit. The Circuit Court noted the trial judge made only one remark in the presence of the jury which might be considered deprecatory and "even in light of the judge's prior statement [telling the jury to disregard Ms. Loehrs' testimony concerning being stopped from work as a "falsity"], we 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. This issue having been litigated through Petitioner's direct appeal, it "will not be considered in a § 2255 collateral attack." *United*

States v. Warner, 23 F.3d at 291. *See also, United States v. Taylor*, 492 Fed. Appx. 941, 944 (10th Cir. 2012).

CONCLUSION AND ORDER

The § 2255 motion by Petitioner, as analyzed herein, is without merit and must, therefore, be denied. The files and record before the Court conclusively establish Petitioner is not entitled to any relief, accordingly, an evidentiary hearing is not required. *United States v. Marr*, 856 F.2d 1471, 1472 (10th Cir. 1988)(no hearing required where § 2255 motion may be resolved on review of record before the Court).

A certificate of appealability (COA) may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner, for the reasons set forth herein, cannot make the required showing, and a COA should not issue.

IT IS THEREFORE HEREBY ORDERED Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody is **DENIED**; and

IT IS FURTHER ORDERED a certificate of appealability **shall not issue**.

Dated this 24th day of ~~April~~ May, 2013.

ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE