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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Ryan Galal VanDyck,

10 Petitioner,

11 v.

12 United States of America,

13 Respondent.
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No. CV-21-00399-TUC-CKJ

ORDER

15 On October 4, 2021, the Petitioner filed a Motion under 28 U.S.C. § 2255 to Vacate,
16 Set Aside, or Correct Sentence by a Person in Federal Custody (Petition). He raises two
17 claims of constitutional error: 1) his trial counsel was ineffective for failing to raise a Fourth
18 Amendment challenge to the police opening an America Online, Inc. (AOL) email
19 attachment without a warrant, and 2) his appellate counsel was ineffective for failing to
20 challenge the extension of a search warrant deadline because it was based on knowingly
21 false statements.

22 On December 5, 2016, the Court sentenced the Petitioner, Defendant VanDyck, in
23 CR 15-742-TUC-CKJ to concurrent sentences of 240 months imprisonment followed by
24 lifetime supervised release for conspiracy to produce child pornography and 60 months
25 imprisonment followed by lifetime supervised release for possession of child pornography.
26 (Judgment of Commitment (Doc. 175)). Pretrial, the Court denied Petitioner's motion to
27 suppress evidence obtained during a search of his home, including child pornography found
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1 on electronic devices seized during the search. Thereafter, he agreed to a bench trial based
2 on a stipulated record. The Court found him guilty on June 7, 2016.

3 On direct appeal, the Petitioner argued for the first time that police needed a warrant
4 to open the AOL email attachment, and therefore, that the evidence against him should be
5 suppressed as fruits of this poisonous tree. The appellate court denied relief because it
6 found the Petitioner waived the challenge by failing to raise it at trial. On appeal, he did
7 not challenge the warrant extension. His direct appeal was denied, and his conviction
8 affirmed on July 15, 2019. The Supreme Court denied his petition for *certiorari* on October
9 5, 2020. He filed his habeas Petition within the one-year statute of limitation period
10 provided under the Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 23255(f).

11 A. 28 U.S.C. § 2255: Motion to Vacate or Correct Sentence

12 Title 28 of the United States Code, Section 2255 provides for collateral review of
13 Petitioner's sentence as follows:

14 A prisoner in custody under sentence of a court established by Act of
15 Congress claiming the right to be released upon the ground that the sentence
16 was imposed in violation of the Constitution or law of the United States, or
17 that the court was without jurisdiction to impose such sentence, or that the
18 sentence was in excess of the maximum authorized by law, or is otherwise
subject to collateral attack, may move the court which imposed the sentence
to vacate, set aside or correct the sentence. A motion for such relief may be
made at any time.

19 28 U.S.C. § 2255.

20 A district court will summarily dismiss a § 2255 petition "[i]f it plainly appears from
21 the face of the motion and any annexed exhibits and the prior proceedings in the case that
22 the Petitioner is not entitled to relief." Rule 4(b), Rules Governing § 2255 Actions. The
23 district court need not hold an evidentiary hearing when the Petitioner's allegations, viewed
24 against the record, either fail to state a claim for relief or are patently frivolous. *Marrow*
25 *v. United States*, 772 F.2d 525, 526 (9th Cir. 1985).

26 Generally, "claims not raised on direct appeal may not be raised on collateral review
27 unless the petitioner shows cause and prejudice." *Massaro v. United States*, 538 U.S. 500,
28 504 (2003); *see also United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003) ("A
§ 2255 movant procedurally defaults his claims by not raising them on direct appeal and

1 not showing cause and prejudice or actual innocence in response to the default.”). Claims
2 of ineffective assistance of counsel are, however, an exception and may be raised on
3 collateral review even if they were not raised on direct appeal. *See Massaro*, 538 U.S. at
4 504 (“[A]n ineffective-assistance-of-counsel claim may be brought in a collateral
5 proceeding under § 2255, whether the petitioner could have raised the claim on direct
6 appeal.”); *United States v. Jackson*, 21 F.4th 1205, 1212 (2022) (ineffective assistance of
7 counsel claims may be brought in collateral proceedings under § 2255.”)

8 B. Ineffective Assistance of Counsel Standard of Review

9 The Supreme Court enunciated a two-prong standard for judging a criminal
10 defendant's contention that the Constitution requires a conviction to be set aside because
11 counsel's assistance at trial was ineffective in *Strickland v. Washington*, 466 U.S. 668
12 (1984). First, the defendant must show that, considering all the circumstances, counsel's
13 performance fell below an objective standard of reasonableness. *Id.* at 687-88. To this end,
14 the defendant must identify the acts or omissions that are alleged not to have been the result
15 of reasonable professional judgment. *Id.* at 690. The court must then determine whether, in
16 light of all the circumstances, the identified acts or omissions were outside the wide range
17 of professionally competent assistance. *Id.* at 688-90. Second, the defendant must
18 affirmatively prove prejudice. *Id.* at 691-92. He must show that there is a reasonable
19 probability that, but for counsel's unprofessional errors, the result of the proceeding would
20 have been different. *Id.* at 694. A reasonable probability is a probability sufficient to
21 undermine confidence in the outcome. *Id.*

22 The court need not address both *Strickland* requirements if the petitioner makes an
23 insufficient showing regarding just one. *Id.* at 697 (explaining: “[i]f it is easier to dispose
24 of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course
25 should be followed.”); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) (stating: “[f]ailure
26 to satisfy either prong of the *Strickland* test obviates the need to consider the other.”)

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1 C. The Warrant and Warrantless Searches

2 Both of the ineffective assistance of counsel claims challenge alleged searches by
3 Tucson Police officers that occurred when, without a warrant, police officers opened the
4 email attachment that was sent by AOL to the National Center for Missing and Exploited
5 Children (NCMEC), a private organization, which in turn secured Petitioner’s identity and
6 sent a Cybertip report with a copy of the image and notation that it “appears to contain
7 child pornography” to Tucson police. Police opened the email attachment without a warrant
8 based on the third-party doctrine, which provides:

9 [A] person has no legitimate expectation of privacy in information he
10 voluntarily turns over to third parties.” *Smith v. Maryland*, 442 U.S. [735,
11 743-44 (1979)]. That remains true “even if the information is revealed on the
12 assumption that it will be used only for a limited purpose.” *United States v.*
Miller, 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). As a result,
the Government is typically free to obtain such information from the
recipient without triggering Fourth Amendment protections.

13 *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018).

14 Detective Holewinski obtained a search warrant for Petitioner’s home, including
15 any electronic devices based on his affidavit which stated in pertinent part that AOL had
16 made a Cybertip report to NCMEC “in reference to one of its users sending an image
17 depicting child sexual abuse to another email address.” The affidavit described the image
18 attached to the email as: “sexually exploitive in nature.” Detective Holewinski described
19 the filename 266211007.jpeg as: “an image file of a prepubescent male child who appears
20 to be between 7 and 12 years of age. The boy is wearing a red shirt and is wearing a pair
21 of boxer shorts that are pulled down to his upper thighs. The child is lying back and his
22 erect penis is exposed. The focus of the image is on the child’s penis.” The affidavit reflects
23 that the police had verified the tip as “in fact” depicting a child in a state of exploitive
24 exhibition” and secured thereafter the comcast subscriber information which reflected the
25 subscriber was a landscape company owned by the Petitioner. The Court accepts
26 Petitioner’s argument that information provided in the affidavit, without the description of
27 the email attachment after it was viewed by Holewinski, would not have been enough to
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1 secure the warrant to search Petitioner’s home and electronic devices. (Motion at Ex. 3:
2 Warrant and Affidavit (Doc. 1-2) at 44-47.)

3 The original warrant was to be executed on September 4, 2014. Police amended the
4 warrant based on an affidavit attesting that Petitioner was out of town and would be back
5 in town the week of September 8, 2014. Petitioner argues that he was home on the 4th,
6 therefore, the warrant affidavit falsely stated that he would not be home until the 8th.

7 D. Ineffective Assistance of Trial Counsel

8 1. Carpenter v. United States, 138 U.S. 2206 (2018): Third Party Doctrine

9 When an individual intends to preserve something as private, and this expectation
10 of privacy is one that society is prepared to recognize as reasonable, then intrusion into that
11 private sphere by the government is a search under the Fourth Amendment and requires a
12 warrant. *Id.* at 2213. “[A] person has no legitimate expectation of privacy in information
13 he voluntarily turns over to third parties.” *Id.* at 2216 (quoting *Smith*, 442 U.S. at 743-44).
14 This is true “even if the information is revealed on the assumption that it will be used only
15 for a limited purpose.” *Id.* (quoting *Miller*, 425 U.S. at 443).

16 During the pendency of his direct appeal, the Supreme Court issued *Carpenter*, upon
17 which Petitioner relies to argue that the third-party doctrine will not support the warrantless
18 search of the email attachment by police. *States v. VanDyck*, 776 F. App’x 495, 496–97
19 (9th Cir. 2019).

20 On appeal, this argument was rejected as waived because Petitioner did not present
21 it at trial to this Court. He also argued the Fourth Amendment required a warrant to obtain
22 the subscriber information associated with his IP address. The Ninth Circuit rejected this
23 argument relying on the conclusion in *United States v. Forrester*, 512 F.3d 500 (9th Cir.
24 2008), that internet users have no expectation of privacy in the IP addresses of the websites
25 they visit because “they should know that this information is provided to and used by
26 Internet service providers for the specific purpose of directing the routing of information.”
27 *United States v. VanDyck*, 776 F. App’x at 496–97 (quoting *Forrester*, 512 F.3d at 510)).
28 The appellate court rejected the notion that *Forrester* must be reconsidered in light of the

1 Supreme Court's decision in *Carpenter*. The appellate court found the *Carpenter* decision
2 was a "narrow one." "In *Carpenter*, the Court declined to extend the third-party doctrine
3 to cell site records"; "an individual maintain[s] a 'legitimate expectation of privacy in the
4 record of his physical movements as captured' through cell site records." *VanDyck*, 776 F.
5 App'x at 496 (quoting *Carpenter*, 138 U.S. at 2217)). On direct appeal, the Ninth Circuit
6 declined to extend *Carpenter* beyond cell site records to subscriber information associated
7 with an IP address. This Court does the same. For the reasons explained below, *Carpenter*
8 does not apply to the email attachment that was an image of child pornography.

9 In *Carpenter*, the government asked the Supreme Court to find that the third-party
10 doctrine applied to cell-site records compiled by a wireless carrier. This digital data tracks
11 a person's movement and is compiled by the carrier for its own business purposes,
12 including finding weak spots in their network and applying roaming charges when another
13 carrier routes data through its cell sites or selling aggregated location records to data
14 brokers, etc. Cell phones continuously generate this data by scanning their environment
15 looking for the best signal from the closest site and tap into the wireless network several
16 times a minute whenever the phone signal is on, even if the cell phone is not in use by the
17 subscriber. Without a warrant, law enforcement obtained cell site records for Carpenter's
18 cell phone for a four-month period which showed he was near four of the charged robbery
19 locations. The trial court, affirmed on appeal, denied suppression of the cell site data
20 because he shared the information with a third-party, his wireless carrier. *Carpenter*, 138
21 S.Ct. at 2212.

22 The Supreme Court reversed. It rejected application of cases addressing a person's
23 expectation of privacy in information voluntarily turned over to third parties like *United*
24 *States v. Miller*, 425 U.S. 435 (finding no expectation of privacy in bank's financial records
25 for Miller) and *Smith v. Maryland*, 442 U.S. 735 (finding no expectation of privacy in
26 dialed telephone numbers compiled by the telephone company to route phone calls).
27 Instead, the Court followed *United States v. Jones*, 565 U.S. 400, which concluded that
28 privacy concerns are raised by GPS tracking because it obtains the whole of a person's

1 physical movements. The distinction between the two being two-fold: 1) the nature of the
2 document or information sought and 2) the act of sharing. In *Jones*, the nature of the
3 protected interest was the extremely personal compilation or a person's every movement
4 as compared to minimal personal interests in *Smith and Miller* where third-party business
5 records were compiled by the businesses for their own business purposes. *Carpenter*, 138
6 S. Ct. at 2217-2221. Comparatively, agents surreptitiously installed and activated a GPS
7 device on Jones' vehicle, but Miller voluntarily revealed his affairs to the bank by using
8 checks, deposit slips, and bank statements, and Smith voluntarily conveyed numbers to the
9 phone company as he dialed them. *Id.* at 2215-2216.

10 In dissent, justices criticized *Miller* and *Smith*, explaining they are limited such as
11 when the government obtains the modern-day equivalents of an individual's own papers or
12 effects even if held by a third party. *Carpenter*, 138 S.Ct at 2230 (Justice Kennedy,
13 dissenting, joined by Justices Thomas and Alito) (citing *United States v. Warshak*, 631
14 F.3d 266, 283-88 (6th Cir. 2010) (emails held by Internet service provider are like letters
15 held by a mail carrier, *Ex parte Jackson*, 96 U.S. 727, 733 (1878)). Concluding, "whatever
16 may be left of *Smith* and *Miller*, few doubt that e-mail should be treated much like the
17 traditional mail it has largely supplanted—as a bailment in which the owner retains a vital
18 and protected legal interest." *Carpenter*, 138 S.Ct at 2270 (Justice Gorsuch, dissenting).
19 The Petitioner urges this Court to follow this line of reasoning and find police officers
20 trespassed into a constitutionally protected space when they opened his email without a
21 warrant and/or that the email is constitutionally protected property, like a piece of mail.
22 (Reply (Doc. 20) at 12-18); *Ex parte Jackson*, 96 U.S. 727, 733 (1878) (finding individual's
23 own papers include letters held by mail carrier).

24 In Petitioner's case, however, law enforcement did not intrude into his email
25 accounts at all. AOL occasioned the intrusion and then turned the email information over
26 to NCMEC, which transmitted the Cybertip report and a copy of the email attachment to
27 law enforcement. Law enforcement viewed a copy of the email attachment. The
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1 government did not inspect any private area of any electronic device until it obtained a
2 warrant. There was simply no warrantless physical trespass into Petitioner’s property.

3 After *Carpenter*, the third-party doctrine remains. *Miller* and *Smith* remain good
4 law, albeit the third-party doctrine has been narrowed. The Court finds that *Carpenter* does
5 not apply to preclude application of *Smith* and *Miller* to the facts of this case which are
6 distinguishable from *Jones* and *Carpenter*. While the dissent discounted *Miller* and *Smith*,
7 the majority rejected a singular property-based approach to the Fourth Amendment.
8 According to the majority in *Carpenter*, *Jones* “breathed new life” into the property based
9 Fourth Amendment’s roots in common-law trespass. *Carpenter*, 138 S.Ct. at 2213. There,
10 the inquiry is whether a state actor physically intruded into private property “for the
11 purpose of obtaining information.” *Jones*, 565 U.S. at 404-405. If “the Government obtains
12 information by physically intruding on persons, houses, papers, or effects, a search within
13 the original meaning of the Fourth Amendment has undoubtedly occurred.” *United States*
14 *v. Thomas*, 726 F.3d 1086, 1092 (9th Cir. 2013) (cleaned up).

15 “The Fourth Amendment indicates with some precision the places and things
16 encompassed by its protections: persons, houses, papers, and effects.” *Florida v. Jardines*,
17 569 U.S. 1, 6 (2013). In *Jones*, the Supreme Court made it clear that the trespassory-focus
18 it renewed, only extended to searches of “those items (‘persons, houses, papers, and
19 effects’) that [the Fourth Amendment] enumerates.” *Jones*, 565 U.S. at 411 n.8; *see also*
20 *Patel v. City of Montclair*, 798 F.3d 895, 898 (9th Cir. 2015) (adopting this understanding
21 of *Jones*). In other words, the authority issued after *Jones* makes it clear that “*Jones*
22 establishes a default rule that a government intrusion with respect to the enumerated items
23 of the Fourth Amendment, regardless of a defendant's reasonable expectation of privacy,
24 will implicate the constitutional protection against unreasonable searches and seizures”
25 while “*Katz* [*v. United States*, 389 U.S. 347 (1967)] broadens the reach of the Fourth
26 Amendment beyond the enumerated areas to those areas where the defendant manifests a
27 reasonable expectation of privacy.” *Patel*, 798 F.3d at 900.

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1 The majority approach in *Carpenter*, finding that the third-party doctrine did not
 2 apply to defeat *Carpenter's* reasonable expectation of privacy, 138 S.Ct. at 2211–19,
 3 assumed a search under the Fourth Amendment pursuant to the *Katz* twofold requirement:
 4 “first that a person [has] exhibited an actual (subjective) expectation of privacy and,
 5 second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”
 6 *Katz*, 389 U.S. at 361 (Justice Harlan concurring).¹ Compare *Riley v. California*, 573 U.S.
 7 373, 378–403 (2014) (analyzing the warrantless inspection of cell phone data in terms of
 8 *Katz* privacy expectations, not *Jones* property intrusions) with *Florida v. Jardinas*, 569
 9 U.S. 1, 11–12 (2013) (applying *Jones*, with focus on government’s physical occupation of
 10 tangible thing, like vehicle, house, or its curtilage); *United States v. Dixon*, 984 F.3d 814,
 11 816 (9th Cir. 2020) (same). This is the relevant approach here.

12 2. *United States v. Wilson*, 13 F.4th 961 (9th Cir. 2021): Private Search
 13 Exception

14 The Fourth Amendment protects individuals from government intrusions, not
 15 private ones; a private party may conduct a search that would be unconstitutional if
 16 conducted by the government. The private search exception to the Fourth Amendment
 17 warrant requirement applies in circumstances where a private party’s intrusions would have
 18 constituted a search had the government conducted it, and the material discovered by the
 19 private party then comes into the government’s possession. *Id.* at 967-971. Then, law
 20 enforcement need not “avert their eyes.” *Id.* at 967 (quoting *Coolidge v. New Hampshire*,
 21 403 U.S. 443, 489 (1971)).

22 During the pendency of this Petition, the Ninth Circuit decided *Wilson*, which
 23 considered facts very similar to those presented in this case. *See* (Response (Doc. 10) at 14
 24 n. 5) (asserting it was wrongly decided)). In *Wilson*, the court concluded that police violated

25 ¹ “[T]he Fourth Amendment protects people, not places. What a person knowingly
 26 exposes to the public, even in his own home or office, is not a subject of Fourth Amendment
 27 protection. *See Lewis v. United States*, 385 U.S. 206, 210 (1966); *United States v. Lee*, 274
 28 U.S. 559 (1927). But what he seeks to preserve as private, even in an area accessible to the
 public, may be constitutionally protected. *See Rios v. United States*, 364 U.S. 253 (1960);
Ex parte Jackson, 96 U.S. 727, 733 (1877).” *Katz v. United States*, 389 U.S. 347, 351-52
 (1967).

1 the Fourth Amendment by opening an email containing child pornography without a
2 warrant based on a Cybertip report to NCMEC from Google. In *Wilson*, the court assumed
3 the agent's review of Wilson's email attachments was a search within the meaning of the
4 Fourth Amendment. *Wilson*, 13 F.4th at 967. The court considered whether "[the agent]
5 was permitted to look at [Wilson's] email attachments under the private search exception,
6 such that the Fourth Amendment did not require him to procure a warrant." *Id.*

7 Finding the private search exception to be narrow with limited application, the court
8 concluded "an antecedent private search excuses the government from obtaining a warrant
9 to repeat the search but only when the government search does not exceed the scope of the
10 private one." *Id.* at 968. The test is "the degree to which they [the government] exceeded
11 the scope of the private search." *Id.* (citing *Jacobsen*, 466 U.S. 109, 115(1984)).

12 In *Wilson*, the court concluded the private search doctrine did not except the email
13 search from Fourth Amendment warrant protections because the government's search
14 exceeded the scope of the antecedent private search by Google. Like the Cybertip report of
15 Petitioner's email, Google's Cybertip report of Wilson's email was based on an automated
16 assessment that the images defendant uploaded were the same as images other provider
17 employees had earlier viewed and classified as child pornography; no employee from
18 Google viewed the actual email attachment image. The government's search exceeded this
19 scope because agents actually viewed the image, allowing them to determine exactly what
20 the images showed and to learn that the images were in fact child pornography. *Wilson*, 13
21 F.4th at 973-974. The "government learned new, critical information that it used to obtain
22 a warrant and then to prosecute defendant for possession and distribution of child
23 pornography." *Id.* at 972.

24 The court described the "gulf" between Google's hash-tag repository of images
25 sorting illicit images into one of four generic labels, including the A1 classification for
26 images depicting a sex act involving a prepubescent minor. *Id.* at 972. Here, the gulf is
27 arguably wider between the exacting graphic description of the image in the warrant to
28 search the Petitioner's electronic devices and the Cybertip report from AOL, which simply

1 described that the email “appears to contain child pornography.” Because no one at Google
2 had looked at the images, “any privacy interest in those images had [not] been
3 extinguished; the Google algorithm ““frustrated [Wilson’s] [privacy] expectation in part,
4 but it ‘did not . . . strip the remaining unfrustrated portion of that expectation of all Fourth
5 Amendment protection.’” *Id.* at 976.

6 Under *Wilson*, the record in Petitioner’s case would support suppression of the
7 evidence gathered pursuant to the warrantless search of the email attachment, and further
8 suppression of all the evidence found pursuant to the warrant to search his electronic
9 devices because that warrant was based on the fruit of the poisonous tree, the warrantless
10 search of the email image. *Wilson*, however, does not answer the question of whether
11 reviewing email attachments is a search within the meaning of the Fourth Amendment
12 because in *Wilson*, the parties and the court assumed opening the email without a warrant
13 was a search. *Id.* at 967.

14 Here, the government makes no such concession. Respondent argues that under the
15 AOL terms of service and privacy policy, the Petitioner knew that his email attachments
16 were subject to monitoring by AOL and disclosure to law enforcement. In other words,
17 Petitioner did not have a reasonable expectation in the privacy of the email attachments,
18 especially there was no reasonable expectation in privacy in email attachments that contain
19 child pornography. The Government does not need to invoke the private search exception,
20 unless inspection by law enforcement of the email attachment was a search for Fourth
21 Amendment purposes.

22 3. Fourth Amendment Search: Reasonable Expectation of Privacy

23 A Fourth Amendment “search” occurs when the government invades a person’s
24 “reasonable expectation of privacy.” *Jones*, 565 U.S. at 404 (quoting *Katz v. United States*,
25 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). Whereas the government carries the
26 burden to establish the private search exception, the burden is on the Petitioner to
27 demonstrate that he had a reasonable expectation of privacy in the area searched. *United*
28 *States v. Sarkisian*, 197 F.3d 966, 986 (9th Cir. 1999); *United States v. Nerber*, 222 F.3d

1 597, 599 (9th Cir. 2000). Standing is a threshold issue, and the Court will not proceed with
2 a Fourth Amendment analysis unless the Petitioner can establish standing² to contest the
3 search. *United States v. Singleton*, 987 F.2d 1444, 1449 (9th Cir. 1993). A reasonable
4 expectation of privacy exists if: (1) “the individual manifested a subjective expectation of
5 privacy in the object of the challenged search?” and (2) “society is willing to recognize that
6 expectation as reasonable?” *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Rakas v.*
7 *Illinois*, 439 U.S. 128, 143–44 (1978). This two-prong test reflects that the privacy interest
8 is both subjective and objective. *United States v. Ford*, 34 F.3d 992, 995 (11th Cir. 1978).
9 In other words, Petitioner must show he subjectively expected his email attachment was
10 private and that this expectation was reasonable.

11 In 2014, AOL’s email service required a user account to be opened pursuant to a
12 subscriber consent agreement, including the AOL terms of service and privacy policy. By
13 clicking “Sign Up” the subscriber acknowledged receipt of the terms of service, and there
14 were hyperlinks to both the terms of service and privacy policy. (Response (Doc. 10) at 2-
15 3 (citing Exhibit A: Create Account)).

16 The terms required the following: “[compliance] with applicable laws and
17 regulations and not participate in, facilitate, or further illegal activities”; forbade the user
18 from “post[ing] content that contains explicit or graphic descriptions or accounts of sexual
19 acts or is threatening, abusive, harassing, defamatory, libelous, deceptive, fraudulent,
20 invasive of another’s privacy, or tortious.” The terms included: notice that to “prevent
21 violations and enforce [the terms] and remediate any violations,” AOL reserved the right
22 to “take any technical, legal, and other actions that we deem, in our sole discretion,
23 necessary and appropriate without notice to [the user].” *Id.* at 3 (quoting Ex. B: Terms of
24 Service).

25
26 ² To establish standing to challenge the legality of a search or seizure, a defendant must
27 demonstrate that he or she has a “legitimate expectation of privacy” in the items seized or
28 the area searched. *United States v. Padilla*, 508 U.S. 77, 82 (1993) (*per curiam*) (Padilla
D); *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) The proponent of a motion to suppress has
the burden of establishing that his own Fourth Amendment rights were violated by the
challenged search or seizure.” *Rakas v. Illinois*, 439 U.S. 128, 132 n.1 (1978), *abrogated*
in part on other grounds by Minnesota v. Carter, 525 U.S. 83 (1998).

1 The terms of service incorporated the separate AOL privacy policy, including: AOL
2 “may use information about [the user’s] use of certain communication tools (for example,
3 AOL e-mail or AOL Instant Messenger)”; “AOL does not read [the user’s] private online
4 communications without [the user’s] consent,” although “[t]he contents of the user’s]
5 online communications, as well as other information about [the user] as an AOL user, may
6 be accessed and disclosed” where “AOL has a good faith belief that a crime has been or is
7 being committed by an AOL user . . .” *Id.* (quoting Ex. C: Privacy Policy)

8 In summary, the terms of service expressly precluded use of AOL email to send
9 illegal attachments, which includes child pornography. Petitioner was expressly warned
10 that AOL could “take any technical, legal, and other actions” that it deemed necessary and
11 appropriate. Additionally, the privacy policy confirmed that even if AOL did not read the
12 text of emails, it monitored the contents of emails and attachments and would disclose
13 illegal material to law enforcement. The Court agrees with the Respondent that the
14 Petitioner’s use of AOL email, under the terms of service and privacy policy, is factually
15 inconsistent with a manifestation of a subjective expectation of privacy. The Petitioner’s
16 assertion of a subjective expectation in privacy is especially suspect because he included
17 in the subject line the directive: “please trade.” (Reply, Ex. 1: Supp. Motion to Suppress
18 (Doc. 20-1) at 1.)

19 This is not a case like *Wilson* where the Court may determine whether a person’s
20 reasonable privacy expectations have been reduced or compromised. Like all Fourth
21 Amendment cases, the Court must make the threshold assessment of whether inspection
22 by law enforcement of the email attachment was a search for Fourth Amendment purposes.

23 The Court finds that generally a person may have a reasonable expectation of
24 privacy in his or her emails and email attachments, but that is not the dispositive question.
25 Instead, the Court must determine whether any expectation of privacy was reasonable in
26 relation to this email attachment, which specifically was an image of child pornography
27 that Petitioner sent to another person under the subject heading of “please trade.” If the
28 Court assumes Petitioner manifested a subjective expectation of privacy in the email

1 attachment, even in the face of the evidence cited above suggesting the contrary, this same
2 evidence goes a long way to defeat his claim under the objective prong of the Fourth
3 Amendment analysis. *Compare: United States v. Chavez*, 423 F. Supp. 3d 194, 201–06
4 (W.D. N.C. 2019) (defendant has subjective expectation of privacy in information on
5 Facebook account he attempted “to exclude the public” from seeing and that expectation
6 is objectively reasonable) *with United States v. Meregildo*, 883 F. Supp. 2d 523, 525–26
7 (S.D. N.Y. 2012) (no expectation of privacy in Facebook posts shared with “friends”);
8 *United States v. Khan*, 2017 WL 2362572, *8 (N.D. Ill. 2017) (no expectation of privacy
9 in Facebook account not invoking any privacy settings); *United States v. Westley*, 2018
10 WL 3448161, *5–6 (D. Conn. 2018) (same).

11 “Relevant here, a reasonable person’s ‘privacy expectations may be reduced if the
12 user is advised that information transmitted through the network is not confidential and
13 that the systems administrators may monitor communications transmitted by the user.’”
14 (Response (Doc. 10) at 11 (quoting *United States v. Heckenkamp*, 482 F.3d 1142, 1147
15 (9th Cir. 2007) (finding an objective reasonable expectation in privacy when student
16 attached his computer to university server because university did not announce monitoring,
17 but finding special needs exception to warrant requirement)). *See United States v. Morel*,
18 922 F.3d 1, 10 (1st Cir. 2019) (applying the third-party doctrine, post-*Carpenter*, finding
19 no reasonable expectation of privacy in photos uploaded to a photo-sharing service called
20 Imgur), *United States v. Ackerman*, 296 F. Supp. 3d 1267, 1272 (D. Kan. 2017) (holding
21 no reasonable objective expectation of privacy” in email attachment containing child
22 pornography in light of the terms of service stating AOL monitored emails and would take
23 legal action if it discovered illegal material), *aff’d on other grounds*, 804 F. App’x 900, 903
24 (10th Cir.) (mem. decision), cert. denied, 141 S. Ct. 458 (2020)).

25 Courts universally find a subscriber does not maintain a reasonable expectation of
26 privacy with respect to subscriber information because: 1) there is a distinction between
27 content of electronic communications, which is protected, and non-content information,
28

1 like a subscriber's screen name and screen identity, which is not;³ 2) the language of the
2 Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. 2701 et seq.,⁴
3 expressly permits ISPs to disclose subscriber information to non-governmental third parties
4 and also to the government under certain restrictive conditions, and 3) subscriber
5 agreements with the internet service providers (ISPs) usually expressly provide for this
6 disclosure. These factors cut in favor of finding a subscriber's subjective expectation of
7 privacy in his or her non-content information as being one that society would not be willing
8 to accept as objectively reasonable. *Freedom v. Am. Online, Inc.*, 412 F.Supp.2d 174, 181-
9 83 (Conn. 2005) (citing *United States v. Hambrick*, 55 F.Supp.2d 504 (W.D.Va.1999), aff'd
10 225 F.3d 656 (4th Cir.2000) (rejecting fruit of the poisonous tree argument related to IPS
11 compliance with government subpoena by IPS providing defendant's name and fact that
12 he was connected to Internet at IP address because society would not accept such a privacy
13 interest); *United States v. Kennedy*, 81 F.Supp.2d 1103 (D.Kan.2000) (same). As explained
14 in *Hambrick*, objective reasonableness is a value judgment and a determination of how
15

17 ³ See: *Smith*, 442 U.S. at 741 (distinguishing listening devices that acquire contents of
18 communication from pen registers that do not); *Forrester*, 512 F.3d at 509–12 (finding a
19 computer user has no legitimate expectation of privacy in the to/from addresses of email
20 messages sent from, and the internet protocol (“IP”) addresses visited by, a defendant on
21 his home computer); see also: *In Ex parte Jackson*, 96 U.S. at 732–33 (distinguishing
22 Fourth Amendment protection for contents of sealed envelopes even when turned over the
23 third party mail carrier does not extend to address and other information disclosed on face
24 of the envelope); *Lustiger v. United States*, 386 F.2d 132, 139 (9th Cir. 1967) (same), *Guest*
25 *v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (finding homeowner's reasonable expectation of
26 privacy in home and belongings, including computer; asserting that “Users would logically
27 lack a legitimate expectation of privacy in the materials intended for publication or public
28 posting. [citation omitted].) They would lose a legitimate expectation of privacy in an e-
mail that had already reached its recipient; at this moment, the e-mailer would be analogous
to a letter-writer, whose expectation of privacy ordinarily terminates upon delivery of the
letter.”)

⁴ Congress enacted the Electronic Communications Privacy Act of 1986 protecting against
the unauthorized interception of various forms of electronic communications and updating
federal privacy protections and standards given changes in computer and
telecommunications technologies. Title I of the Act addresses interception of wire, oral and
electronic communications. Title II addresses access to stored wire and electronic
communications and transactional records. Title III addresses pen registers and trap and
trace devices. *Hambrick*, 55 F. Supp. 2d at 507. *Hambrick* challenged Title II. Petitioner's
case falls under Title I.

1 much privacy we should have as a society under certain circumstances. *Hambrick*, 55 F.
2 Supp.2d at 506.

3 Here, Petitioner was not an anonymous actor. He agreed to AOL's terms of service
4 and privacy policy making him aware that AOL was monitoring his email attachments and
5 could disclose them to law enforcement if they involved illegal conduct, including child
6 pornography. He knew his email was not private. He intentionally and knowingly attached
7 an illegal image of child pornography to an email he knew was monitored by AOL and
8 subject to disclosure to law enforcement. He shared it with another person without any
9 restriction placed on its use, such as marking the email confidential. Instead, in the subject
10 line, an area subject to view without opening the email, he invited sharing: "please trade."
11 These facts cut against society accepting Petitioner's subjective belief in the privacy of the
12 email attachment as being a reasonable expectation. This is consistent with finding any
13 privacy expectation Petitioner may have had in the email attachment has been reduced
14 under *Heckenkamp* or that there is no reasonable expectation of privacy based on the third-
15 party doctrine.

16 Society has strong public policy in favor of protecting children against acts of sexual
17 abuse. *C.J.C. v. Corp. of Cath. Bishop of Yakima*, 138 Wash. 2d 699, 726, 985 P.2d 262,
18 276 (1999), as amended (Sept. 8, 1999). In that interest, Congress can prohibit the display
19 of materials that are harmful to minors. *Ginsberg v. New York*, 390 U.S. 629 (1968),
20 including protecting children from exposure to sexually explicit material, *Reno v. Am. C.L.*
21 *Union*, 521 U.S. 844, 875 (1997). Two federal statutes, the Stored Communications Act
22 and the Protect Our Children Act, in combination create a statutory scheme placing legal
23 reporting obligations on Internet Service Providers (ISPs)⁵, like AOL.

24 The Stored Communications Act (SCA)⁶ criminalizes unauthorized searches of
25 stored electronic communications content, 18 U.S.C. § 2701(a)–(b), but expressly excepts
26 electronic communication service providers (ESPs)⁷ from liability. *Id.* § 2701(c)(1). This

27 _____
28 ⁵ See n. 7.

⁶ SCA was enacted as Title I of the Electronic communications ACT (ECPA)

⁷ An ISP is an electronic communications service provider (ESP).

1 exception is necessary to enable ESPs to ensure that user content does not violate the ESPs'
2 own terms of use. Because the Stored Communications Act does not authorize ESPs to do
3 anything more than access information already contained on *their* servers as dictated by
4 their terms of service, ESPs may conduct warrantless searches. The Protect Our Children
5 Act requires these private parties, including AOL, to report evidence derived from those
6 searches to a government agent or entity, 18 U.S.C. § 2258A. The Protect Our Children
7 Act disclaims any governmental mandate to search and provides that this statute “shall
8 [not] be construed to require” a “provider”⁸ to “monitor” users or their content or
9 “affirmatively search, screen, or scan for” evidence of criminal activity. 18 U.S.C. §
10 2258A(f). In this way, searches are at the discretion of the provider and done for its own
11 business interests in keeping child pornography and exploitation off their platforms; there
12 is a direct financial interest in keeping child pornography off platforms to not lose
13 advertising opportunities or be blocked from app stores. *Cf., United States v. Rosenow*, 50
14 F.4th 715, 729–31 (9th Cir. 2022) (finding as matter of first impression that these federal
15 laws do not transform ESP private searches into government action).

16 In *Wilson*, the Court described the statutory reporting responsibility as follows: “[i]n
17 order to reduce ... and ... prevent the online sexual exploitation of children,” such
18 providers,” . . . “as soon as reasonably possible after obtaining actual knowledge” of “any
19 facts or circumstances from which there is an apparent violation of ... child pornography
20 [statutes],” must “mak[e] a report of such facts or circumstances” to NCMEC. 18 U.S.C. §
21 2258A(a). NCMEC adds subscriber details and forwards a CyberTip report to the
22 appropriate law enforcement agency for possible investigation. *Id.* at §§
23 2258A(a)(1)(B)(ii), (c). This statutory scheme, especially the Protect Our Children Act,
24 reflects society’s determination that internet communications that appear to violate child
25 pornography statutes should not be private in the context of the Fourth Amendment. In
26 other words, government intrusion to protect our children from sexual exploitation is not
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28 ⁸ 2018 Amendments, Pub.L. 115-395 § 2(7)(A) (stuck out “an electronic communication service provider or a remote computing service provider” and inserted “a provider.”)

1 an infringement on a legitimate privacy interest; child pornography is not a personal or
2 societal value protected by the Fourth Amendment.

3 The factors identified in the cases finding no reasonable expectation of privacy in
4 subscriber information are all met here, except the email attachment is content. Therefore,
5 *Forrester*,⁹ wherein the Ninth Circuit determined there is no legitimate expectation of
6 privacy in subscriber information, the to/from addresses of email messages, and the internet
7 protocol (IP) addresses visited by the user, is distinguishable.

8 “Determining whether society would view the expectation of privacy as objectively
9 reasonable turns on whether the government’s intrusion infringes on a legitimate interest,
10 based on the values that the Fourth Amendment protects.” *California v. Ciraolo*, 476 U.S.
11 207, 212 (1986) “[T]he test of legitimacy is not whether the individual chooses to conceal
12 assertedly ‘private activity,’ but instead is whether the government’s intrusion infringes
13 upon the personal and societal values protected by the Fourth Amendment.” *Id.* (quoting
14 *Oliver v. United States*, 466 U.S. 170, 182-83 (1984)). “No single factor determines
15 whether an individual legitimately may claim under the Fourth Amendment that a place
16 should be free of government intrusion, but courts give weight to such factors as the
17 “intention of the Framers of the Fourth Amendment, the uses to which the individual has
18 put a location, and our societal understanding that certain areas deserve the most scrupulous
19 protection from government invasion.” *Oliver*, 466 U.S. at 177-178. “Official conduct that
20 does not ‘compromise any legitimate interest in privacy’ is not a search subject to the
21 Fourth Amendment.” *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (quoting *Jacobsen*,
22 466 U.S. at 123).

23 In *United States v. Place*, 462 U.S. 696 (1983), the Supreme Court held a “canine
24 sniff” by a drug-sniffing dog was not a search within the meaning of the Fourth
25 Amendment. 462 U.S. at 707. In *Place*, law enforcement seized luggage from a passenger
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27 ⁹ See *Supra* at 5 (quoting *VanDyck*, 776 F. App’x at 496–97 (quoting *Forrester*, 512
28 F.3d at 510)) (explaining internet users “should know that this information is provided to
and used by Internet service providers for the specific purpose of directing the routing of
information.”)

1 and took it to another location where a drug-sniffing dog alerted officers that drugs were
2 in the luggage; officers obtained a warrant to search the luggage and found cocaine. *Id.* at
3 699. Recognizing a reasonable expectation in privacy in the contents of personal luggage,
4 the Court held the dog's sniff test was not a Fourth Amendment search and emphasized the
5 unique nature of the investigative technique, which could identify only criminal activity.
6 The Court reasoned that a "canine sniff" by a well-trained narcotics detection dog, does
7 not require opening the luggage and does not expose noncontraband items that otherwise
8 would remain hidden from public view, as compared to an officer looking through the
9 contents of the luggage. The manner of the investigation being much less intrusive than a
10 typical search and the disclosure reflecting only the presence or absence of narcotics, a
11 contraband item, the Court found the canine sniff is "*sui generis*;" it discovers nothing
12 uniquely personal. The Court noted: "We are aware of no other investigative procedure
13 that is so limited both in the manner in which the information is obtained and in the content
14 of the information revealed by the procedure. . . . -- exposure of respondent's luggage,
15 which was located in a public place, to a trained canine -- did not constitute a "search"
16 within the meaning of the Fourth Amendment." *Place*, 462 U.S. at 707.

17 In *United States v. Jacobsen*, the Supreme Court extended *Place* to the chemical
18 field test of a white powdery substance to reveal that the substance was cocaine. 466 U.S.
19 at 122-24. Federal Express employees opened a damaged package to discover zip-lock
20 plastic bags containing a white powder, called law enforcement, and repacked the contents
21 in the original packaging before officers arrived, who then removed the plastic bags from
22 the broken package, opened them, and field-tested the white powder, identifying it as
23 cocaine. *Id.* at 111-12. The Supreme Court held that removal of the plastic bags from the
24 tube and the agent's visual inspection was not a Fourth Amendment violation because
25 agents learned nothing that had not previously been learned during the private search, *id.*
26 at 120, but noted it remained to be determined whether the additional intrusion occasioned
27 by the field test, which had not been conducted by the Federal Express employees,
28 exceeded the scope of the private search and was, therefore, an unlawful "search" within

1 the meaning of the Fourth Amendment, *id.* at 122. This finding was relied on in *Wilson* and
2 discussed above in the context of applying the private search exception to Fourth
3 Amendment searches. *See supra.* at 10.

4 Relying on *Place*, the Court in *Jacobsen* concluded that the additional digital scan
5 of the white substance was not a Fourth Amendment search, because the test disclosed only
6 whether the substance was cocaine and “nothing [else],” . . . “not even whether the
7 substance was sugar or talcum powder.” Turning first to determine whether this was a
8 search subject to the Fourth Amendment, the Court asked, “whether it infringed an
9 expectation of privacy that society is prepared to consider reasonable?” *Id.* at 122.

10 The Court found a chemical test that merely discloses whether a particular substance
11 is cocaine does not compromise any legitimate interest in privacy. It hinged this conclusion
12 on the fact that virtually all field tests conducted under comparable circumstances will
13 result in positive drug findings, but the conclusion did not dependent on the test results.
14 Even if the test were negative, no legitimate privacy interest has been compromised. The
15 Court explained that “Congress has decided-and there is no question about its power to do
16 so--to treat the interest in ‘privately’ possessing cocaine as illegitimate; thus, governmental
17 conduct that can reveal whether a substance is cocaine, and no other arguably ‘private’
18 fact, compromises no legitimate privacy interest.” *Id.* at 123.

19 Here, Congress has done the same. With passage of the Protect Our Children Act,
20 Congress has treated the interest in privately possessing child pornography as illegitimate.
21 The government’s conduct at issue in this case can only reveal whether an image is child
22 pornography. No other private fact is revealed when the government opens an image
23 reported to it in a Cybertip. While the Court in *Place* could not imagine another
24 investigative procedure more limited both in the manner that information is obtained and
25 in the content of the information revealed by a procedure, those at issue here are such. A
26 private party, AOL, reviewed, monitored, and reported the email attachment pursuant to
27 terms of service and privacy policies that Petitioner expressly agreed applied to his use of
28 AOL email. Law enforcement received a Cybertip pursuant to a reliable hashtag system

1 designed by EPS companies to identify child pornography by designated category. It was
2 a virtual certainty that the image attached to the Cybertip report was illegal child
3 pornography. There was nothing uniquely private about the copy of the email attachment
4 included in the Cybertip report that law enforcement officers opened. Officers did not have
5 access to and did not open the Petitioner's email or look in any areas of his computer or
6 other electronic devices.

7 This Court concludes that society has decided the interest in "privately" possessing
8 child pornography is illegitimate. Opening the image attached to the Cybertip report did
9 not infringe an expectation of privacy that society is prepared to consider reasonable.
10 Opening the copy of the image of child pornography included in the Cybertip report was
11 not a search within the meaning of the Fourth Amendment.

12 Importantly, the context of this Court's inquiry is whether Petitioner's trial counsel
13 was ineffective, i.e., whether counsel's performance fell below an objective standard of
14 reasonableness. To assesses the merits of Petitioner's assertion that his trial counsel should
15 have raised a Fourth Amendment challenge to the warrantless search of the AOL email
16 attachment, the Court must determine whether, in light of all the circumstances, this
17 omission was outside the wide range of professionally competent assistance, and if so,
18 whether this prejudiced the result of the trial proceeding. Even with the advantage of
19 *Carpenter* and *Wilson*, the claim fails on the merits. The Petitioner cannot establish
20 prejudice because he cannot show a reasonable probability that he would have prevailed
21 with a motion to suppress and would not have been convicted, if trial counsel had
22 challenged the warrantless opening of the email attachment in the Cybertip report.

23 In 2014, trial counsel could reasonably have concluded that this challenge would
24 not succeed because it was not a search for purposes of the Fourth Amendment based on
25 the third-party doctrine or AOL's subscriber agreement, or that if there was a search, the
26 private search exception applied. In short, trial counsel could reasonably have concluded
27 the claim lacked merit. Even if not entirely meritless, the claim's viability was sufficiently
28 doubtful to permit a reasonable attorney to omit it in favor of other better arguments. *See*

1 *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (holding not ineffective assistance
2 of counsel claim that was not frivolous but would not have led to reasonable probability of
3 reversal). Trial counsel filed two motions to suppress raising multiple challenges, therefore,
4 the Court concludes that he exercised professional discretion to omit this claim. *See Smith*
5 *v. Murray*, 477 U.S. 527, 536 (1986) (“winnowing out weaker arguments on appeal and
6 focusing on those more likely to prevail, . . . is the hallmark of effective appellate
7 advocacy.” (quoting *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983))). The Court finds that
8 the decision to not raise this claim did not fall “below an objective standard of
9 reasonableness” and was not outside the range of competence demanded of attorneys in
10 criminal cases.” *Strickland*, 466 U.S. at 687.

11 E. Ineffective Assistance of Appellate Counsel

12 Petitioner claims his appellate counsel was ineffective for failing to assert this Court
13 erred when it rejected his argument that the amended warrant extending the deadline for
14 execution was based on a knowingly false statement. This claim arose because the original
15 warrant provided for police to execute it by September 4, 2014, but when police found out
16 Petitioner was not at home, they sought an amended warrant which extended the execution
17 date to September 9, 2014. The affidavit for the amendment provided that “Before the
18 warrant was served, detectives found out that one of the residents of the home was out of
19 town. This resident, Ryan VanDyck, has previously been investigated in crimes relating to
20 child pornography and inappropriate relationship with a minor child. Ryan VanDyck will
21 be back in town the week on 9/8/14.” (Motion, Ex. 4: Amended Warrant (Doc. 1-2) at 49.)
22 Petitioner argued that he returned home on September 4, 2014. After hearing testimony,
23 this Court found officers had a good faith basis for the statements made in the affidavit.

24 At the suppression hearing, police attested they generally executed search warrants
25 on Thursday because that was when both officers were usually available. September 4 was
26 a Thursday. Police became aware through Petitioner’s wife, by use of “a ruse,” that
27 Petitioner would not be home that day. Police also surveilled his home on that day and did
28 not see him there. The following Monday, September 8, police sought the amendment

1 supported by the affidavit attesting the Petitioner would be back in town the week on
2 September 8, 2014, requesting to serve the warrant on the ninth. (Response (Doc. 10) at 5
3 (citing Excerpts of Record (ER) 128-231, 169)).

4 The Court assumes that the Petitioner returned home on the 4th as reflected in his
5 travel itinerary, but he would not have been home before 4p.m. State law, A.R.S. § 13-
6 3917 prohibits executing search warrants at night, defined as after 6:30p.m., without a
7 judicial finding of good cause. When police sought the amendment, they were not privy to
8 Petitioner's travel itinerary, except they were told by his wife that he was out of town until
9 September 4, and they did not see him at home that day. This Court finds no false
10 statements in the affidavit, but there is an omission of the fact that, according to Petitioner's
11 wife, he would be home on the fifth. The Court notes that the fifth was beyond the original
12 warrant's execution deadline., therefore, an extension was required. Instead, of seeking the
13 amendment on Friday, police waited until Monday, September 8, 2014. So what?

14 While the Court found Petitioner's ineffective assistance of trial counsel claim to be
15 extremely weak, his claim of ineffective assistance of appellate counsel is frivolous,
16 especially when considering the standard of review. When a magistrate judge issues a
17 warrant, the reviewing court will usually not second guess the finding of probable cause.
18 *United States v. Leon*, 468 U.S. 897, 913–14 (1984). Issuance of a search warrant carries
19 “a presumption of validity with respect to the affidavit supporting the search warrant,”
20 *Franks v. Delaware*, 438 U.S. 154, 171 (1978), except if the magistrate relied on false
21 statements that the affiant made knowingly or recklessly, *Leon*, 468 U.S. at 154. Then,
22 suppression may remedy a warrant that lacked probable cause, if Petitioner can establish,
23 by a preponderance of the evidence, the following: (1) the affiant officer intentionally or
24 recklessly made false or misleading statements or omissions in support of the warrant, and
25 (2) the false or misleading statement or omission was material, i.e., necessary to finding
26 probable cause.” *United States v. Norris*, 942 F.3d 902, 909–10 (9th Cir. 2019).

27 This Court finds no reason to revise the finding made after the *Franks* hearing that
28 the warrant extension application did not contain any knowingly false statements. More

1 importantly, this Court affirms its earlier finding that the alleged omission was not material
2 to the issuance of the search warrant. Materiality turns on whether any alleged
3 misrepresentations affected the magistrate’s determination of probable cause. *Franks*, 438
4 U.S. at 172. The accepted litmus test for a *Franks* motion is whether probable cause
5 remains once any misrepresentations are corrected, and any omissions are supplemented.
6 *Norris*, 942 F.3d at 910. Here, Petitioner argued that the representation was the but-for
7 cause of the magistrate’s decision to grant the warrant extension, but any alleged false
8 statements relevant to extending the time to execute the warrant did not materially affect
9 the probable cause determination. *Norris*, 942 F.3d at 910.

10 Appellate counsel could not have shown this Court’s good faith finding was clearly
11 erroneous or that there was a material omission in the affidavit, therefore, an appellate
12 challenge would have been meritless. As such, appellate defense counsel did not perform
13 deficiently by exercising discretion not to raise a meritless claim. *See Wildman v. Johnson*,
14 261 F.3d 832, 840 (9th Cir. 2001) (“[A]ppellate counsel’s failure to raise issues on direct
15 appeal does not constitute ineffective assistance when appeal would not have provided
16 grounds for reversal.”). As noted above, the fact that appellate counsel raised a number of
17 other Fourth Amendment arguments further supports that he carefully reviewed the record
18 and issues and exercised discretion to not raise arguments that would be futile. *See Pollard*
19 *v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997) (observing that “[a] hallmark of effective
20 appellate counsel is the ability to weed out claims that have no likelihood of success,
21 instead of throwing in a kitchen sink full of arguments with the hope that some argument
22 will persuade the court”).

23 F. Conclusion

24 In short, this Court’s finding that both these claims lack of merit means that the
25 omission of these claims could not have reasonably resulted in reversal on appeal. *See*
26 *Moormann*, 628 F.3d at 1107 (finding that appellate counsel’s omission of a meritless claim
27 meant counsel’s performance was not deficient and no prejudice resulted). Petitioner has
28 not established ineffective assistance of trial or appellate counsel under *Strickland*.

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Accordingly,

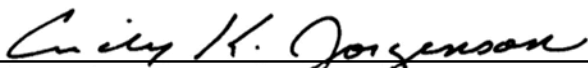
IT IS ORDERED that Petitioner's "Motion to Vacate Sentence or Correct Sentence (Doc. 272)," pursuant to 28 U.S.C. § 2255, filed in CR 15-742-TUC-CKJ and (Doc. 1) filed in CV 21-399-TUC-CKJ is DENIED.

IT IS FURTHER ORDERED that Civil case number CV 22-399-TUC-CKJ is DISMISSED with prejudice.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment accordingly and close this case.

IT IS FURTHER ORDERED that, pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court issues a certificate of appealability on the Petitioner's claim of ineffective assistance of trial counsel but not on the ineffective assistance of appellate counsel claim. "[J]urists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right" only related to trial counsel's performance. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *see also United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015) (explaining prisoner demonstrates substantial underlying constitutional claims under *Slack* when "reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.")

Dated this 15th day of December, 2022.


Honorable Cindy K. Jorgenson
United States District Judge