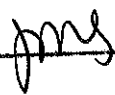


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**CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

BY  DEPUTY

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

**ROBERT LEE WILLIAMS,**  
  
Movant,  
  
vs.  
  
**UNITED STATES OF AMERICA,**  
  
Respondent.

Case Nos. 15cv2126 BEN  
11cr3529 BEN

**ORDER DENYING § 2255  
MOTION**

**INTRODUCTION**

Movant filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct a sentence. The Government filed a response. Movant filed a reply. The Court finds no evidentiary hearing is necessary and denies the motion.

**DISCUSSION**

Movant was tried by a jury and found guilty of violating 18 U.S.C. § 2252(a)(2) (receipt of images of minors engaged in sexually explicit conduct) and § 2252(a)(4)(B) (possession of matters containing images of sexually explicit conduct) and sentenced to 240 months in prison. The judgment was affirmed on appeal. Movant now contends that: (1) his appellate attorney provided ineffective assistance; (2) judicial deception required a *Franks* hearing; and (3) a search warrant was procured in violation of due process.

1           **Ineffective Assistance of Appellate Counsel.** Movant was appointed Mr.  
2 Kurt Hermansen, Esq., to represent him on appeal. Mr. Hermansen is a very skilled  
3 attorney. He is no stranger to the task of evaluating appellate arguments. In fact,  
4 Mr. Hermansen served as a habeas corpus staff attorney for the district court in the  
5 1990's. Mr. Hermansen consulted with Movant about issues for appeal. Though  
6 ultimately unavailing, Mr. Hermansen filed a 98-page opening appeal brief, and a  
7 67-page reply appeal brief, raising five issues for reversal.

8           Appellate briefing included a 13-page argument that Movant wanted Mr.  
9 Hermansen to argue: *i.e.*, that the search warrant should have been suppressed. That  
10 issue was decided against Movant by the Ninth Circuit Court of Appeals. It is the  
11 same issue he raises once again in the present § 2255 motion. Movant has  
12 demonstrated neither ineffective assistance of his appellate counsel, nor prejudice.  
13 On the contrary, Movant received excellent assistance of appellate counsel.  
14 Therefore, the § 2255 motion fails to satisfy the two-pronged ineffective assistance  
15 of counsel test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *See*  
16 *also Mitchell v. U.S.*, 790 F.3d 881, 885 (9th Cir. 2015) (“defense team conducted a  
17 professional-caliber investigation and then, facing unenviable choices, made a  
18 reasonable strategic decision . . . . Strategic decisions such as this do not support a  
19 claim of ineffective assistance of counsel”).

20           **Judicial Deception Required *Franks* Hearing.** Movant also argues that his  
21 appellate counsel was ineffective because he should have raised for appeal the  
22 district court’s denial of a *Franks* hearing for the state search warrant based on his  
23 answers to the police employment questionnaire. This claim would have failed.  
24 “The law does not require counsel to raise every available nonfrivolous defense.  
25 Counsel also is not required to have a tactical reason – above and beyond a  
26 reasonable appraisal of a claim's dismal prospects for success – for recommending  
27 that a weak claim be dropped altogether.” *Knowles v. Mirzayance*, 556 U.S. 111,  
28 127 (2009) (citations omitted). In the same vein, it is clear that the failure to take

1 futile action can never be deficient performance. *Sexton v. Cozner*, 679 F.3d 1150,  
2 1157 (9th Cir. 2012).

3 The affidavit supporting the search warrant was accurate. Clearly, it was not  
4 ineffective assistance to not raise it on appeal. Regardless, Fourth Amendment  
5 exclusionary rule claims are generally not even cognizable on habeas review. See  
6 *Davis v. U.S.*, 564 U.S. 229 (2011) (citations omitted) (“Exclusion is not a personal  
7 constitutional right, nor is it designed to redress the injury occasioned by an  
8 unconstitutional search. The rule’s sole purpose, we have repeatedly held, is to  
9 deter future Fourth Amendment violations.”). In *Stone v. Powell*, 428 U.S. 465, 494  
10 (1976), the Supreme Court recognized that habeas proceedings are so far removed  
11 from the offending conduct that any deterrent effect is outweighed by the societal  
12 cost of ignoring reliable, trustworthy evidence and the judicial burden of litigating  
13 collateral issues. Where defendant has had an opportunity for full and fair litigation  
14 of a Fourth Amendment claim, habeas corpus relief is not available on the ground  
15 that the evidence obtained in an unconstitutional search or seizure was introduced at  
16 his trial. *Id.*

17 **CONCLUSION**

18 The motion is denied. The Court declines to issue a certificate of  
19 appealability.

20 **IT IS SO ORDERED.**

21  
22 DATED: 2/28/2018

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24 \_\_\_\_\_  
25 Hon. Roger T. Benitez  
26 United States District Court  
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