No. _____

In The

Supreme Court of the United States

DONATOS SARRAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER DEFENSE COUNSEL PROVIDED MR. SARRAS INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO SATISFY THE *DAUBERT* STANDARD FOR ADMISSION OF DR. FERDON'S OPINION THAT MR. SARRAS WAS NOT THE MAN IN THE CHARGING IMAGES.

II. WHETHER DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO ADEQUATELY INVESTIGATE THE THEORY OF DEFENSE HE HIMSELF SELECTED, PROMISED THE JURY IN OPENING STATEMENT, CALLED HIS CLIENT TO SUPPORT IN TESTIMONY AT TRIAL AND RELIED UPON IN CLOSING ARGUMENT, IN THAT COUNSEL FAILED TO OBTAIN OTHER NEEDED AND AVAILABLE EXPERT WITNESSES TO CORROBORATE THE DEFENSE AND PROVE MR. SARRAS' ACTUAL INNOCENCE.

III. WHETHER DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT ON *DAUBERT* GROUNDS TO THE TESTIMONY OF GOVERNMENT EXPERT, DR. JABLONSKI AND THE K-2 IMAGES.

IV. WHETHER MR. SARRAS ASSERTS A FREE STANDING CLAIM THAT HE IS ENTITLED TO A NEW TRIAL BECAUSE OF THE VIOLATION OF HIS RIGHTS UNDER ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS (VCCR), APR. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, AND A COROLLARY CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S FAILURE TO OBJECT TO THE VIOLATION OF HIS VCCR RIGHTS.

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISION

TABLE OF AUTHORITIES – Continued

Page

STATUTES

RULES

TREATIES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Donatos Sarras, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit, entered in *United States v. Donatos Sarras,* in Eleventh Circuit Case Number 13-15856-D, filed August 29, 2014 denying Sarras' request for a certificate of appealability of the denial of his petition filed under Title 28, United States Code § 2255. The order of the Eleventh Circuit is unreported, but a true and correct copy is included in Appendix A, *infra*. The United States District Court for the Middle District of Florida had previously denied Sarras' 2255 petition in an unpublished order entered October 28, 2013, a copy of which is also included in the Appendix.

OPINION BELOW

The decision and order of the Eleventh Circuit was without written opinion, and was unreported. The decision of the district court on the merits of the 2255 petition was also unreported.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit denying Sarras' request for certificate of appealability pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> Amendment VI. Jury trials for crimes, and procedural rights
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

TREATY PROVISION INVOLVED

Vienna Convention on Consular Relations, Article 36, provides:

> Article 36
>
> Communication and Contact
> with Nationals of the Sending State
>
> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> a. consular officers shall be free to communicate with nationals of the

sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

b. if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

c. consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall

> refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

STATEMENT OF THE CASE

Pursuant to Title 28, United States Code § 2253(c)(1)(B), and Rule 22(b), Federal Rules of Appellate Procedure, Donatos Sarras ("Sarras"), is requesting a Certificate of Appealability ("COA") from the Order dated and entered October 28, 2013 denying his Petition filed under 28 U.S.C. § 2255. Rule 22(b) of the Federal Rules of Appellate Procedure and Title 28 U.S.C. § 2253 require issuance of a COA before an appeal may be heard of a denial of a petition for relief under 28 U.S.C. § 2255. Sarras filed a timely notice of appeal. Thereafter the Eleventh Circuit Court of Appeals denied the COA request by an unreported citation order without opinion, which also dismissed Sarras' appeal. This certiorari petition followed in a timely manner.

OVERVIEW OF THE CASE

Mr. Sarras, a well-to-do business man and Greek Citizen resident in the United States, was falsely accused May 7, 2007 by E.M., the then fourteen year old daughter of an ex-wife, of having had sexual intercourse with her sometime in the preceding year. Her fabricated accusation was completely unsubstantiated, and came at the same time as her mother, W.M., stole $70,000 from a joint back account with Mr. Sarras. The Seminole County Sheriff's detective who received the complaint from E.M. arranged a controlled, monitored and recorded phone call between E.M. and Mr. Sarras, in which E.M. made her accusations to Mr. Sarras and the detective waited to hear whether Mr. Sarras would incriminate himself in response. Mr. Sarras responded indignantly and flatly denied the accusation. He told E.M. that he would call her mother and report this to her and get to the bottom of it. Mr. Sarras in fact tried to immediately call the mother to report this to her, but the detective, who was sitting with the mother, did not allow the mother to answer her phone, no doubt fearing that this conversation would only serve to further weaken a now discredited accusation. E.M. further claimed that Mr. Sarras had taken pictures with a digital camera of the two of them having sex in his bedroom sometime between Thanksgiving and Christmas of 2006, and she suspected he had transferred these pictures to his laptop computer although she had never personally seen them.

The Seminole County Sheriff's detective obtained a state search warrant for Mr. Sarras' home, which was searched hours after the controlled phone call. Mr. Sarras' prior educational and employment background had been in electrical engineering with an emphasis in computers. Several computers were found in his home, all of which he had personally made. A laptop was found on a coffee table in the family room. The laptop was not username and pass word secured and could be accessed/used by anyone who would turn it on. The laptop was thoroughly inspected using EnCase forensic software on the spot by Erik Zabik, a computer forensic investigator for the Seminole County Sheriff. The search revealed nothing incriminating. The computers were seized as was a Sony digital camera, described as a Sony Cyber-shot DSC-S50 model, serial number 172080, which was a camera that W.M. and E.M. had been using until January of 2007 when it was given as a gift to Mr. Sarras.

Eighteen days later the Seminole County Sheriff's Office forensic computer investigator recovered 41 images from the laptop computer that was among the computers seized from Mr. Sarras.[1] Zabik did not recover them from the seized Sony camera SN 172080 which had 6 non-incriminating images on it. All but

[1] Zabik had not found these images on the laptop during his initial EnCase search while still in Mr. Sarras' residence. A mirrored hard drive was not made at the residence before Zabik began assessing the computer.

fourteen of these forty-one images were of E.M. alone, naked. Some of these images are taken by E.M herself. Fourteen of the images were of a male and female torso, genitals exposed, facing each other, from the waist down. In some of the fourteen images with the male member, E.M.'s face is showing. The man's face could not be seen nor enough of his body to be readily identifiable.

The model and serial number of the camera that took the images was not recorded in their EXIF data. No other pornography was found on any computer. These 41 images (which we will refer to as the "Charging Images" or sometimes as "Q-1"), were the basis of the charges that were then filed against Mr. Sarras.

Mr. Sarras was first charged in state court, but later indicted in federal court in this case (the state charges were ultimately dismissed). The superseding indictment on which Mr. Sarras went to trial alleged four offenses. Counts one, two, and three all alleged that Mr. Sarras violated 18 U.S.C. § 2251(a) and (e) by knowingly persuading a minor to engage in sexually explicit conduct. Count One alleged the date of October 16, 2006; Count Two alleged the date of October 17, 2006; and Count Three alleged the dates of October 23-24, 2006. Count Four alleged that on May 7, 2007, Mr. Sarras knowingly possessed child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). A forfeiture count sought forfeiture of Mr. Sarras' residence, the Sony SN 172080 camera, and the laptop computer.

Mr. Sarras retained a well known criminal defense firm in Orlando to represent him, NeJame, LaFay, Jancha, Ahmed, Barker & Joshi. Partner Rick Jancha assumed the primary responsibility for his defense. Mr. Jancha held himself out as an exceptionally well qualified and experienced criminal defense attorney, having been a member of the Bar since 1977, and having been an Assistant United States Attorney for twenty-two years, five of which he was the Managing Assistant United States Attorney in Orlando.

Mr. Sarras told Mr. Jancha that he was not guilty of the charged offenses. Mr. Sarras has never waivered in the assertion of his actual, factual and legal innocence. Mr. Jancha built his defense strategy around that assertion. It was obvious from the beginning of the case that the defense would have to prove that E.M. was not telling the truth, and that Mr. Sarras was not the man in the Charging Images. It would also be necessary to show forensically that the computer evidence was consistent with the Charging Images having been planted on the computer by E.M. or someone assisting E.M.[2]

Attorney Jancha retained Dr. Edward J. Ferdon, an internist physician who was the director of an erectile dysfunction clinic to examine Mr. Sarras and to examine the Charging Images. Dr. Ferdon examined Mr. Sarras in both an erect and flaccid

[2] E.M. had access to the home, computer and camera.

state. He was the only expert to do so. The Charging Images showed an erect penis.

The Government had obtained a court order permitting a photographer for the Orange County Medical Examiner's Office to take comparison pictures with the Sony Cyber-shot camera seized from Mr. Sarras' home. These comparison photos were supervised and approved as they were being done by the case agent, FBI Special Agent Savage. These images are sometimes referred to as the "Court Comparison Photos" or "K-1." Attorney Jancha had Dr. Ferdon compare the Charging Images to the Court Comparison Photos to determine whether Mr. Sarras was the person in the Charging Images, based on an expert examination of Mr. Sarras' penis, erect, as compared to the penis in the Charging Images and the Court Comparison Photos.

Attorney Jancha retained Mr. Doug Rehman, an independent forensic computer expert, formerly employed by the Florida Department of Law Enforcement, to examine the computer evidence. Defense computer expert Rehman testified that the computer evidence was consistent with the Charging Images having been planted on the computer 24 hours prior to the search, on May 6, 2007, the day E.M. supposedly first told her mother that Mr. Sarras had had sex with her.[3] Mr. Rehman was also able to verify, from

[3] Note that the mother did not go to the police the day the girl allegedly first made her accusation, May 6, 2007, a Sunday,

(Continued on following page)

images found on the laptop, that the confiscated Sony SN 172080 camera was in the possession of W.M. and E.M. before and after October 2006 when the 41 charging images were taken.

The case was tried twice, the first jury could not reach a verdict. The second trial resulted in a conviction. At the first trial, which hung, the Government did not have any expert to testify to the identity of the person in the Charging Images. Dr. Jablonski examined Mr. Sarras before and after the first trial, but only in a flaccid condition (this was Dr. Jablonski's choice). Dr. Jablonski was unable to identify Mr. Sarras as the person in the Charging Images and he did not offer trial testimony to that effect. The Government then moved to exclude Dr. Ferdon and said that Dr. Jablonski [as to whom the Government had produced no expert report under Rule 16] would be used only if Dr. Ferdon offered testimony.

The testimony of E.M., standing alone, was insufficient even with the Charging Images, to obtain a guilty verdict in the first trial. One problem for the Government in the first trial was that there was a mole on Mr. Sarras' penis which showed in the Court

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instead she waited to the next day when she could go to Mr. Sarras' bank and steal $70,000 from their joint account; only then did she go to the police with the accusation. Also note that both E.M. and W.M. had access at will to Mr. Sarras' home, computers and the Sony camera, even when Mr. Sarras was not present.

Comparison Photos but there was no similar mole in the Charging Images.

After the first trial the Government obtained permission from the Court to allow Dr. Jablonksi to examine Mr. Sarras again and new comparison pictures to be made using Dr. Jablonski (the "Government/ Jablonksi Photos" or "K-2"). Mr. Sarras argued at the time and renews his argument that Dr. Jablonski manipulated Mr. Sarras' flaccid penis and hand held and pulled the penis for purposes of producing the new pictures. The purpose of this manipulation was to cause the mole which appears on Mr. Sarras' penis at a position that would have shown in the Charging Images had Mr. Sarras been the man in the Charging Images, to not appear in the Government/Jablonksi Photos, and to explain away the missing mole in the Charging Images.

The District Court sustained a Government pretrial motion to exclude Dr. Ferdon, the defense medical expert, from testifying as to his opinion that Mr. Sarras was not the person in the Charging Images on the basis that attorney Jancha had failed to provide a *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), foundation for the testimony. Attorney Jancha failed to provide a *Daubert* foundation for Dr. Ferdon, and the result was that the District Court prohibited Dr. Ferdon from testifying to the jury in the second trial that in his expert opinion Mr. Sarras was not the man in the Charging Images. Dr. Ferdon would have explained that Mr. Sarras could not be the person in the Charging

Images based on a number of identifying anatomical features, including the veins in the penis in the Charging Images compared to the veins in Mr. Sarras' penis as seen in the Court/Comparison Images/Photos and from Dr. Ferdon's own examination of Mr. Sarras in an erect state.

In addition, it was obvious that a successful defense of this case required the use of various experts: an image analyst, a qualified urologist, an EXIF data expert, perhaps a camera expert, but none were obtained by attorney Jancha.

During the second trial the Government's computer expert, Erik Zabik, testified that the EXIF data was consistent with the Charging Images having been taken by the Sony Cyber-shot DSC S50 camera, SN 172080, seized from Mr. Sarras' house; Zabik did not testify that the EXIF data proved that this Sony camera took the Charging Images. This testimony corroborated that of E.M. who at trial – contrary to her prior statements to the police in which she was uncertain – identified the Sony Cyber-shot camera as having been the camera used by Mr. Sarras to take the Charging Images. This evidence was essential for a conviction, because the Government satisfied the interstate commerce element of all four charges by proving that this camera had been manufactured in Japan and had traveled in interstate commerce to reach Florida. Without this proof, Mr. Sarras' conviction could not have been upheld. The defense was unable to effectively dispute the EXIF data testimony, because the defense had not retained an EXIF data expert to do so.

Mr. Sarras was detained pretrial in the Seminole County Detention Center in Sanford, Seminole County, Florida. As Mr. Sarras explained to the District Court in his *pro se* pleading [Docket 267 District Court Docket] after trial, he fought with the detention facility officials seeking the right to communicate with the Greek Consulate and was not allowed to do so. Mr. Sarras repeatedly requested his attorney assist him in contacting his consulate, but Mr. Sarras' attorney failed to assist Mr. Sarras in enforcing his right of contact with and assistance from his consulate.

Post-trial, using the assistance of the Greek Consulate in Los Angeles, Mr. Sarras retained the services of a number of experts in the relevant disciplines, urology, image analysis, and EXIF data analysis. These or similar experts were readily available prior to Mr. Sarras' trial. Their reports and conclusions, which are discussed below, demonstrate that Mr. Sarras is actually, factually and legally innocent of the charges in this case.

Gerald B. Richards, the former director of the FBI image laboratory in Washington, D.C., perhaps the world's leading forensic image analyst, has examined the Charging Images and Court Comparison Photos and concluded without any doubt that Mr. Sarras is not the person in the Charging Images.

Professor Robert Nelson of the California Institute of Technology, Jet Propulsion Laboratory, another noted image analyst, has examined the Charging and

Court Comparison Photos, as well as the EXIF Data for both, and determined without any doubt that Mr. Sarras is not the person in the Charging Images and that the EXIF data is not consistent with the Sony Cyber-shot camera. He has further concluded that the Charging Images in part had been altered (which affected the EXIF data which was used at trial to convict Mr. Sarras).

Professor Scott Zeitlin, board-certified urologist and professor of urology at the University of California, Los Angeles, has examined the Charging and Court Comparison Photos and concluded that Mr. Sarras is not the person in the Charging Images. He has also explained that it is a medical anatomical fact that a penis could not be rotated as Dr. Jablonski testified Mr. Sarras had rotated his penis to cause the mole to display in the Court Comparison Photos taken by the medical examiner's photographer.

Dr. Irwin Goldstein, perhaps the most noted urologist in North America, has examined the Charging and Court Comparison Photos and concluded that Mr. Sarras is not the man in the Charging Images. Dr. Goldstein also has concluded that as a matter of scientific fact the rotation of the penis testified to by Dr. Jablonski is medically and scientifically impossible.

Mr. Vincente Rosado, former Special Agent, Federal Bureau of Investigation, who worked the past eighteen of his thirty years with the FBI as a forensic computer expert, has examined the EXIF data and

found it inconsistent with the Sony Cyber-shot camera.

Had attorney Jancha retained the above experts or similarly qualified experts prior to trial and used them in Mr. Sarras' defense at trial, Mr. Sarras would not have been convicted.

ARGUMENTS IN SUPPORT OF GRANTING THE WRIT

I. DEFENSE COUNSEL PROVIDED MR. SARRAS INEFFECTIVE ASSISTANCE OF COUNSEL[4] IN FAILING TO SATISFY THE *DAUBERT* STANDARD FOR ADMISSION OF DR. FERDON'S OPINION THAT MR. SARRAS WAS NOT THE MAN IN THE CHARGING IMAGES.

Prior to the trial of this case, the Government filed a motion in limine asking the Court to exclude the expert opinion of defense expert Dr. Ferdon, a medical internist who was prepared to testify that in his expert opinion, after having conducted an examination of Mr. Sarras' genitals in both an erect and flaccid state, and compared the Charging Images with the Court/Comparison Images/Photos, that Mr.

[4] Whenever used herein, the term "ineffective assistance of counsel" refers to the failure to provide effective assistance of counsel guaranteed Mr. Sarras under the Sixth Amendment to the United States Constitution.

Sarras was not the man in the Charging Images. Having examined Mr. Sarras in an erect condition, which was the condition of the penis in the Charging Images, Dr. Ferdon's opinion was based on sufficient facts and data to render an opinion under Rule 702. His testimony was intended to compare the veins and morphology of Mr. Sarras' penis in an erect state with that of the erect penis in the Charging Images. Dr. Ferdon's testimony was admissible had attorney Jancha laid the proper foundation.[5]

The importance of this expert opinion was that if correct, then Mr. Sarras was not guilty of the charged offenses.

The Government's exclusion argument was based on a *Daubert* objection.[6] The Government argued that Mr. Sarras' counsel had not established the *Daubert* foundation required for the admission of Dr. Ferdon's opinion.

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[5] Dr. Jablonski's testimony was objectionable because his examinations were based solely on a flaccid penis – that is, he lacked the necessary foundation for his opinion. Attorney Jancha failed to make a specific and timely objection when Dr. Jablonski testified. Dr. Jablonski's testimony concerning rotation was objectionable because it lacked any medical foundation, and as we have demonstrated in the reports from Professor Dr. Zeitlin and Dr. Goldstein, his opinions were medically impossible, i.e., junk science, inadmissible under *Daubert*.

[6] *Daubert*, 509 U.S. at 589.

Rather than respond to the Government's objection, trial counsel for Mr. Sarras did little more than reiterate Dr. Ferdon's conclusion that Mr. Sarras was not the man in the Charging Images based on his examination of Mr. Sarras, the Court Comparison Photos and the Charging Images.

According to the Eleventh Circuit, the District Court correctly excluded Dr. Ferdon's expert opinion, based on counsel's failure to meet the Government's objection that he establish a *Daubert* foundation for the proposed opinion. The Eleventh Circuit wrote:

> Dr. Ferdon was not allowed to issue an identification opinion concluding that, based on a comparison of the veins in the laptop and defense photos, Sarras is not the person in the laptop photos. What happened in the district court materially informs this issue. In the district court, the government's motion in limine argued that Ferdon's vein comparison as an identification methodology was unreliable under *Daubert*. The government's motion stated that "[t]here is no peer reviewed literature, text book, medical science or other scientific body of data on which the opinion is based, and there is no indication that 'vein-mapping' as a means of identification is generally accepted in the medical or scientific community, has been tested, or has been subjected to peer review or publication." The government claimed that Dr. Ferdon's vein comparison methodology was unreliable because, inter alia, "the degree to which the veins in a male's genitalia are enlarged and

> visible depends on blood flow and degree of arousal, among other things."
>
> Sarras's response in the district court addressed neither argument. Rather, Sarras responded that Dr. Ferdon had examined 15,000 penises, specialized in erectile dysfunction, and was qualified to give an opinion that it was not Sarras in the laptop photos. The district court then concluded that Sarras had not shown that Dr. Ferdon's vein-comparison methodology was a reliable identification technique under *Daubert*.

United States v. Sarras, 575 F.3d 1191, 1210-11 (11th Cir. 2009).

It was ineffective assistance of counsel for Mr. Sarras' trial counsel to fail to respond to the Government's *Daubert* objection. Mr. Sarras could have satisfied a *Daubert* foundation for Dr. Ferdon's testimony.[7] It was deficient performance on his counsel's part to fail to establish the *Daubert* foundation for Dr. Ferdon's testimony and Mr. Sarras was prejudiced by counsel's deficient performance because this Court

[7] If the Court were to conclude that Dr. Ferdon could not meet a *Daubert* standard, then this only strengthens our arguments below that it was ineffective assistance of counsel for attorney Jancha to not obtain a board certified urologist to match Dr. Jablonski, i.e., doctors such as Dr. Goldstein and Prof. Dr. Zeitlin. Certainly their testimony could satisfy any conceivable *Daubert* standard. Both Dr. Goldstein and Prof. Dr. Zeitlin have offered opinions that validate the vein comparison methodology Dr. Ferdon proffered.

cannot be confident beyond a reasonable doubt that the outcome of the trial would have been the same but for counsel's error. Mr. Sarras has consistently asserted his actual factual and legal innocence of the charges and counsel's deficient performance deprived him of the opportunity to present exculpatory evidence of his actual innocence.

On direct appeal Mr. Sarras attempted to argue that the District Court erred in not permitting Dr. Ferdon to render his ultimate issue opinion at trial. The Eleventh Circuit responded in part as follows:

> On appeal, Sarras contends that (1) the jury was not equally capable of visually comparing the veins in the photos of Sarras's penis to those in the penis in the laptop photos and (2) Dr. Ferdon had specialized knowledge warranting his giving an identification opinion about whether Sarras was the person in the laptop photos. . . . In other words, the issue is whether the jury was equally capable of comparing the penises in the photos, or whether expert testimony was permissible to identify the person in the laptop photos. *That is a close issue*. But we need not decide it because, in any event, the district court did not abuse its discretion in its *Daubert* ruling that Sarras had not established that Dr. Ferdon's methodology – comparing veins in erect penises – was a reliable identification methodology . . . ("The proponent of expert testimony always bears the burden to show that his expert is qualified to testify competently

> regarding the matters he intend[ed] to address; [ ] the methodology by which the expert reach[ed] his conclusions is sufficiently reliable; and [ ] the testimony assists the trier of fact." (alterations in original) (quotation marks omitted)).
>
> Notably, Sarras fails to distinguish between the doctor's qualifications to testify about penises and the method by which the doctor reaches his conclusion. The district court did not rule Dr. Ferdon was unqualified to testify about penises. *Rather, the court ruled that Sarras had not shown that the doctor's methodology – comparing veins in erect penises – was a sufficiently reliable identification technique for Dr. Ferdon to opine that Sarras was not the person in the laptop photos. In fact, no record evidence explains the so-called methodology of comparing veins in erect penises as an identification technique. Perhaps blood flow or degree of arousal has no visual effect on the veins in penises. Who knows? The record is silent.* Sarras thus has not shown error, much less reversible error, in the district court's *Daubert* ruling as to Dr. Ferdon's methodology.

United States v. Sarras, 575 F.3d 1191, 1211 (11th Cir. 2009) (emphasis supplied).

Counsel could and should have established the *Daubert* foundation for Dr. Ferdon's testimony. [Sarras filed with the District Court an affidavit of Dr. Edward J. Ferdon, in which Dr. Ferdon proffers a *Daubert* foundation for his opinion.] Counsel's failure

to further prepare a *Daubert* foundation was not, according to his affidavit, based on any inability to do so or as a matter of strategy, but simply due to his mistaken understanding that his *Daubert* response was sufficient.

In view of the well-established *Daubert* standard, Mr. Sarras' trial attorney should have been well aware of the requirements for presenting expert testimony. In support of this ineffective-assistance claim, Mr. Sarras has provided an affidavit from Dr. Ferdon, who contends that counsel made no effort to prepare him to comply with the *Daubert* requirements. Dr. Ferdon confirms that Mr. Sarras' counsel did not provide him with the Eleventh Circuit's *Daubert* standards or ask that he prepare a report for disclosure to the Government and Court that would satisfy the *Daubert* standard. Had Mr. Sarras' counsel requested, Dr. Ferdon would have prepared a complete written report for pretrial disclosure to the Government in compliance with Rule 16 setting forth the *Daubert* basis for his opinion that Mr. Sarras was not the person pictured in the Charging Images. Dr. Ferdon also confirms that Mr. Sarras' counsel did not instruct him to bring copies of the scientific studies that he relied upon in giving his expert opinion.

The hiring of expert witnesses and the presentation of their testimony is typically considered a matter of trial strategy, but Mr. Sarras' defense counsel has admitted that he thought that he had complied

with the *Daubert* standard by his written response to the Government's motion in limine. [Docket 78]

Dr. Ferdon's credentials are extensive and his expertise is beyond any serious dispute. The failure here was simply that of counsel in not preparing Dr. Ferdon to respond to the *Daubert* requirement. Errors of counsel based on misunderstanding the governing law constitutes deficient performance.

Courts have repeatedly held that trial decisions dictated by mistake of law suffices for finding constitutionally deficient performance. See, e.g., *Frierson v. Woodford*, 463 F.3d 982, 994-95 (9th Cir. 2006) (finding counsel ineffective for grievous misunderstanding of whether a witness could properly invoke the Fifth Amendment); *Dando v. Yukins*, 461 F.3d 791, 799 (2d Cir. 2006) (finding counsel's performance constitutionally deficient for failing to seek a mental health expert because of his misunderstanding of the law regarding the availability of such experts); *Greiner v. Wells*, 417 F.3d 305, 325 (2d Cir. 2005) (noting that courts have found deficient performance where counsel's conduct resulted "from a legal error or a misunderstanding of the law") (citing *Terry Williams v. Taylor*, 529 U.S. 362, 395, (2000); *DeLuca v. Lord*, 77 F.3d 578, 587 (2d Cir. 1996); *United States v. Hansel*, 70 F.3d 6, 8 (2d Cir. 1995)).

Mr. Sarras' inability to have his expert witness, Dr. Ferdon, testify that in his expert opinion Mr. Sarras was not the man in the Charging Images was solely the result of his trial counsel's

misunderstanding of the application of *Daubert* to Dr. Ferdon's testimony. This error was deficient performance, and the error was of sufficient magnitude to disrupt the key foundation of his defense at trial, that it was not Mr. Sarras in the Charging Images. Mr. Sarras' trial counsel's misunderstanding of the Governing law as applied to Dr. Ferdon's intended expert opinion testimony undermined Mr. Sarras' defense.

Because Dr. Ferdon was Mr. Sarras' primary way of challenging the general reliability (or lack thereof) of E.M.'s testimony, and this challenge was a central strategy of his defense, this Court must conclude that his trial attorneys' performance was constitutionally deficient for failing to do so and that Mr. Sarras was prejudiced thereby.

Because the Government's case against Mr. Sarras rested on the corroboration of E.M.'s testimony by the identification of Mr. Sarras in the Charging Images, or put the other way around, if it could be shown that the Charging Images did not depict Mr. Sarras, the jury would had to have acquitted Mr. Sarras, counsel's failure to prepare Dr. Ferdon to satisfy the *Daubert* standard cannot be considered reasonable trial strategy, was constitutionally deficient and prejudiced Mr. Sarras. See, e.g., *Draughon v. Dretke*, 427 F.3d 286, 296-97 (5th Cir. 2005) (concluding that counsel's failure to obtain an expert was deficient and that the state court's decision to the contrary was an unreasonable application of *Strickland* [*Strickland v. Washington*, 466 U.S. 668, 687 (1984)]).

Because Dr. Ferdon's testimony would have provided crucial evidence in support of his defense of actual innocence, Mr. Sarras has demonstrated a reasonable probability that the result of his proceeding would have been different if his counsel had presented a *Daubert* foundation for Dr. Ferdon's testimony. Thus, as a result of defense counsel's failure Mr. Sarras suffered actual prejudice. See *Richards v. Quarterman*, 566 F.3d 553, 564-68 (5th Cir. 2009) (concluding that counsel's failure to present exculpatory evidence constituted deficient performance and that the defendant was prejudiced as a result).

Because Mr. Sarras has satisfied both prongs of the *Strickland* test, he has demonstrated a valid claim for ineffective assistance of counsel under the Sixth Amendment, stemming from his attorney's failure to prepare Dr. Ferdon to present a *Daubert* foundation for the admission of his expert opinion testimony, and Mr. Sarras is entitled to relief on this issue.

II. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO ADEQUATELY INVESTIGATE THE THEORY OF DEFENSE HE HIMSELF SELECTED, PROMISED THE JURY IN OPENING STATEMENT, CALLED HIS CLIENT TO SUPPORT IN TESTIMONY AT TRIAL AND RELIED UPON IN CLOSING ARGUMENT, IN THAT COUNSEL FAILED TO OBTAIN OTHER NEEDED AND AVAILABLE EXPERT WITNESSES TO CORROBORATE THE DEFENSE AND PROVE MR. SARRAS' ACTUAL INNOCENCE.

A. EXPERT IMAGE ANALYSIS PROVES MR. SARRAS WAS NOT THE PERSON IN THE CHARGING IMAGES.

(1) GERALD B. RICHARDS, RETIRED CHIEF OF THE FBI IMAGE LAB OPINION.

Gerald B. Richards ("Richards") prior to his retirement from the Federal Bureau of Investigation ("FBI") was for many years the head of the FBI image analysis laboratory in Washington, D.C. In that capacity he has been qualified on many occasions as an expert image analyst in federal criminal trials. Richards is a member or officer of numerous expert bodies, including, but not limited to the American Academy of Forensic Sciences (AAFS) of which he is a Fellow, Questioned Document Section Secretary, 1998, and Member of the Board of Directors, 2000-2003, American Board of Forensic Document Examiners,

Inc. (ABFDE), Diplomate, Board of Directors, 2000-2003, American Society of Questioned Document Examiners (ASQDE), Regular Member, Mid-atlantic Association of Forensic Scientists (MAAFS), President, 1980-1981, Member at Large, 1989, President, 1991-1992, International Association for Identification (IAL), American Society for Testing and Materials (ASTM), Evidence Photographers International Council (EPIC), the Photographic Historical Society of New England, Inc. (PHSNE), Society of Former Special Agents of the Federal Bureau of Investigation, Association of Former Intelligence Officers (AFIO), Technical Working Group for Forensic Document Examination (TWGDOC), Subcommittee for Standardization of Operating Procedures and Terminology and the Technical Working Group for Education and Training in Forensic Science (TWGED).

Image analysis is an expertise long recognized by civil and criminal courts and expert opinion testimony based on the analysis of digital images is not uncommon, particularly in child pornography cases. Richards was available as an expert witness for the defense or Government at the time of Mr. Sarras' trial and had he been retained as an expert witness on behalf of Mr. Sarras, he would have testified that based on his analysis of the Charging Images and the Court Comparison Photos, that Mr. Sarras is not the person in the Charging Images. [His written opinion was filed with the district court.]

(2) DR. ROBERT NELSON, PROFESSOR, JET PROPULSION LABORATORY, CALIFORNIA INSTITUTE OF TECHNOLOGY OPINION.

Professor Dr. Robert Nelson ("Prof. Dr. Nelson"), like Richards, is a noted image analyst. Prof. Dr. Nelson is a Professor at the California Institute of Technology in the Jet Propulsion Laboratory. His work includes image analysis for NASA (the National Aeronautics and Space Administration) among others. Dr. Nelson has held numerous appointments reflecting his preeminence, including among the more recent, Senior Research Scientist, Jet Propulsion Laboratory, California Institute of Technology, 2000 to present, Member of the Senior Research Scientist Council of JPL, 2002-2008, and Lead Scientist NASA's New Millennium Program, 2002. He has rendered expert opinions regarding image analysis to governmental legal offices and private clients pertaining to extraction of information from images in both criminal and civil proceedings.

Prof. Dr. Nelson was available as an expert witness for the defense or Government at the time of Mr. Sarras' trial and had he been retained as an expert witness on behalf of Mr. Sarras, he would have testified that based on his analysis of the Charging Images and the Court Comparison Photos, that Mr. Sarras is not the person in the Charging Images. [His written opinion was filed with the district court.]

Dr. Nelson also explains that the EXIF data from the Charging Images is inconsistent with the EXIF data from the Court Comparison Photos, and that there is other evidence in the EXIF data to show that the EXIF data itself was tampered with.

B. LEADING EXPERTS IN THE FIELD OF UROLOGY PROVE THAT THE PERSON IN THE CHARGING IMAGES IS NOT MR. SARRAS.

(1) DR. IRWIN GOLDSTEIN, DIRECTOR, SAN DIEGO SEXUAL MEDICINE AT ALVARADO HOSPITAL, EXPERT OPINION.

Dr. Irwin Goldstein ("Dr. Goldstein") is the Director of San Diego Sexual Medicine at Alvarado Hospital in San Diego, California. Dr. Goldstein is a leading authority in the field of urology. His accomplishments are too many to report in full, but include holding or having held the following positions or appointments, Clinical Professor of Surgery, University of California, San Diego 2007 to date, Adjunct Professor of Urology, SUNY Downstate 2007 to date, Director, Sexual Medicine, Alvarado Hospital 2007 to date, Professor of Urology, SUNY Downstate 2005-2007, Editor-in-Chief, The Journal of Sexual Medicine, 2004 to date, Editor, International Journal of Impotence Research, 2003, Professor of Gynecology, Boston University School of Medicine, 2002-2005, Director, Institute for Sexual Medicine, Boston University School of Medicine, 2002-2005, Director, Center for Sexual Medicine,

Boston University School of Medicine, 2001-2005, Co-Director, Laboratory for Sexual Medicine Research, Boston University School of Medicine, 1981-2005, Professor of Urology, Boston University School of Medicine, 1990-2005, Associate Prof. of Urology, Boston University School of Medicine, 1985-1990, Director, Div. of Urology, Boston City Hospital, 1982-1987, Assistant Prof. of Urology, Boston University School of Medicine, 1981-1985, Visiting Surgeon, Boston VA Medical Center, 1981-2005, Visiting Surgeon, Boston Medical Center, 1981-2005, Instructor of Urology, Boston University School of Medicine, 1980-1981. Dr. Goldstein is the gold standard among urologists.

Dr. Goldstein was available as an expert witness for the defense or Government at the time of Mr. Sarras' trial and had he been retained as an expert witness on behalf of Mr. Sarras, he would have testified that based on his medical training and experience, and his analysis of the Charging Images and the Court Comparison Photos, that Mr. Sarras is not the person in the Charging Images. [His written opinion was filed with the district court.]

(2) PROFESSOR DR. SCOTT I. ZEITLIN, ASSOCIATE CLINICAL PROFESSOR OF UROLOGY, DAVID GEFFIN SCHOOL OF MEDICINE, UCLA, EXPERT OPINION.

Prof. Dr. Scott I. Zeitlin ("Prof. Dr. Zeitlin") is an associate clinical professor of urology at the David

Geffin School of Medicine at the University of California Los Angeles. Prof. Dr. Zeitlin is also a leading authority in the field of urology. Prof. Dr. Zeitlin was available as an expert witness for the defense or Government at the time of Mr. Sarras' trial and had he been retained as an expert witness on behalf of Mr. Sarras, he would have testified that based on his medical training and experience, and his analysis of the Charging Images and the Court Comparison Photos, that Mr. Sarras is not the person in the Charging Images. [His written opinion was filed with the district court.]

C. VINCENTE ROSADO, RETIRED SPECIAL AGENT FBI, COMPUTER CRIMES EXPERT, EXPERT OPINION THAT THE EXIF DATA DOES NOT PROVE THAT THE CAMERA USED TO ESTABLISH THE JURISDICTIONAL ELEMENT OF THE OFFENSES PRODUCED THE CHARGING IMAGES.

Mr. Vincente Rosado, Special Agent FBI, Retired ("Rosado") was a special agent of the FBI for thirty years, the last eighteen of which he served as a computer expert for the FBI. Mr. Rosado has examined the EXIF data from the Charging Images and compared it to the EXIF data from the Court Comparison Photos, as well as compared it to EXIF data from some non-pornographic images that had been on the camera [Government Exhibit 42] (the "Camera") that the Government turned over after the trial, and

finally compared the EXIF data from the Charging Images to EXIF data Rosado obtained by making a series of digital images using the same make and model Sony Cyber-shot as that taken from Mr. Sarras' home. The result of this test and comparison is that the EXIF data demonstrates that the EXIF data is inconsistent with the Camera and suggests that the Camera was not the source of the Charging Images. [His written opinion was filed with the district court.]

Dr. Nelson has similarly compared the EXIF data from the Charging Images to the EXIF data from the Court Comparison Photos and reached the same conclusion. Further, Dr. Nelson has concluded that some of the Charging Images had been altered (and this in turn affected the EXIF data).

The information upon which Rosado and Dr. Nelson base their conclusions was readily available prior to Mr. Sarras' trial. Mr. Sarras' trial attorney could have and should have retained expert assistance to conduct a comparison of the EXIF data to dispute the testimony of the Government's forensic computer expert at trial, Eric Zabik. Zabik testified that the EXIF data was consistent with the Camera. His testimony was supported by Government Exhibit 44, which was a highly redacted version of an EXIF data report, which excluded all of the inconsistent EXIF data. That testimony and the implication of Government Exhibit 44 was incorrect. Had Mr. Sarras' counsel obtained the expert assistance needed to determine whether the EXIF data was consistent with

the Camera or not, he would have been able to disprove this essential element of the Government's charges, because the Government proved the required interstate commerce element solely on the basis of this Camera having produced the Charging Images. A reasonably competent criminal defense attorney would have obtained the needed expert assistance and had he done so Mr. Sarras could not have been convicted on this evidence.

"Failure to call an expert" claims encompass those situations in which an attorney's performance is found constitutionally deficient because he failed to make a proper investigation to determine what experts were needed and available to support the chosen defense. In such cases, the attorney's deficient performance is typified by his failure to consult with the necessary (or appropriate) expert in preparing a defense. See, e.g., *Dugas v. Coplan*, 428 F.3d 317, 329-30 (1st Cir. 2005) (finding counsel's performance to be deficient when he lacks specialized knowledge about arson investigations and fails to consult with an expert on such investigations when arson is the "cornerstone of the state's case"); *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001) (finding "no excuse for the lawyer's failure to consult experts on hair, DNA, treadmarks, and footprints" when such factors are critical to defense's argument that defendant was not at the scene of the crime) (Posner, J.), remand order modified by stipulation, 268 F.3d 485 (7th Cir. 2001); *Troedel v. Wainwright*, 677 F.Supp. 1456, 1461 (S.D. Fla. 1986) (finding counsel's performance

deficient where counsel "neither deposed . . . the state's expert witness [on gunpowder residue], nor bothered to consult with an expert in the field prior to trial" despite the fact that counsel "knew pretrial this issue would be critical"), aff'd, 828 F.2d 670 (11th Cir. 1987).

As the Court held in *Strickland* "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 691, 104 S. Ct. 2052, 2066 (1984).

With the production of the affidavits of the experts cited above, Mr. Sarras established that his attorney conducted an inadequate investigation and had an adequate investigation been done, as Mr. Sarras easily did post-trial (with the assistance of the Greek Consulate), dispositive exculpatory evidence was readily available. In a case such as this, involving a technical or scientific evidence over which the attorney has no independent expertise, counsel is ineffective for failing to consult with all necessary expert witnesses. See *Pavel v. Hollins*, 261 F.3d 210, 224-25 (2d Cir. 2001), and cases cited therein.

Mr. Sarras argues and the record does not contradict his claim that his trial counsel failed to engage any image analysis expert whatsoever and

conducted no investigation whatsoever into image analysis, neither an expert in examination of images *per se* nor an expert in EXIF data. This was deficient performance. There is no evidence that counsel possessed any expertise in either field, such as would have allowed him to accurately assess the efficacy of proceeding without consulting appropriate experts. *Strickland* established that counsel has the duty to either conduct a reasonable investigation or to make decisions which make such investigation unnecessary. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Here, counsel did neither.

Nor did counsel pursue other evidence from medical professionals that was readily available to establish Mr. Sarras' innocence. Although he did attempt to use Dr. Ferdon, Dr. Ferdon was not a urologist, was not board certified, and was not able, due to the *Daubert* limitations counsel saddled him with, to effectively rebut Dr. Jablonski, the Government's expert urologist. At least from the time that counsel for Mr. Sarras was aware that the Government had retained a board certified urologist, counsel was on notice and had a duty to obtain a matching expert for Mr. Sarras. His failure to do so constitutes deficient performance, and in light of the expert opinions proffered above, prejudiced Mr. Sarras' defense.

The error with respect to the medical professionals was two-fold, one, he was unprepared to establish a sufficient *Daubert* predicate for Dr. Ferdon, and even had he done so, Dr. Ferdon was not a match for Dr. Jablonski, and two, he was unprepared without

consultation with and use of urology experts, to rebut the Government's claim that Dr. Jablonski was competent to testify to the matters as to which he testified, in particular the false or mistaken testimony that Sarras had miraculously rotated his penis in the Court Comparison Photos. Had attorney Jancha been properly prepared after consulting appropriate experts, and had the appropriate experts been available for a pre-trial motion in limine, Dr. Jablonski's testimony would have been excluded and Dr. Ferdon's testimony (together with corroborating testimony from defense urology experts), would have been admitted, and in either or both cases, this Court cannot be confident beyond a reasonable doubt that the outcome of Mr. Sarras' trial would have been the same.

III. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT ON *DAUBERT* GROUNDS TO THE TESTIMONY OF GOVERNMENT EXPERT, DR. JABLONSKI AND THE K-2 IMAGES.

Dr. David Jablonski testified without objection from the defense to his theory that Mr. Sarras had rotated his penis for the purpose of the Court Comparison Photos to make the mole on his penis appear in the pictures when it otherwise, in a natural position would not have. This testimony from Dr. Ferdon was emphasized to the jury in rebuttal closing argument by the Government, and if believed, both contradicted the testimony of Dr. Ferdon and

presented Mr. Sarras as having tampered with the evidence.

That there was no scientific basis for this testimony is evident from the affidavits from both Drs. Goldstein and Zeitlin. Dr. Goldstein and Prof. Dr. Zeitlin make clear that what Dr. Jablonski opined is a medical impossibility. Attorney Jancha should have objected on *Daubert* grounds to this testimony from Dr. Jablonski, and had he objected and presented in opposition testimony from experts such as that presented in the affidavits of Drs. Goldstein and Zeitlin, the District Court would have been required to exclude the opinion testimony of Dr. Jablonski on this crucial point.

A reasonably competent criminal defense counsel would have known to object on *Daubert* grounds to Dr. Jablonski's testimony and the K-2 images which were in effect fabricated by Dr. Jablonski and would have presented the scientific evidence to rebut Dr. Jablonski's junk science testimony and images. Had attorney Jancha done so resulting in the exclusion of Dr. Jablonski's key testimony, this Court cannot be confident beyond a reasonable doubt the outcome of the trial would have been the same.

IV. MR. SARRAS ASSERTS A FREE STANDING CLAIM THAT HE IS ENTITLED TO A NEW TRIAL BECAUSE OF THE VIOLATION OF HIS RIGHTS UNDER ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS (VCCR), APR. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, AND A COROLLARY CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S FAILURE TO OBJECT TO THE VIOLATION OF HIS VCCR RIGHTS.

The Vienna Convention "is an international treaty that governs relations between individual nations and foreign consular officials." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 336 (2006) (Breyer, J., dissenting). When the United States ratified the treaty in 1969, it became the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. Article 36 of the Convention is phrased in terms of the detained foreign national and his or her individual rights. Article 36 imposes three separate obligations on a detaining authority: (1) inform the consulate of a foreign national's arrest or detention without delay; (2) forward communications from a detained national to the consulate without delay; and (3) inform a detained foreign national of "his rights" under Article 36 without delay. Vienna Convention, art. 36(1)(b), 21 U.S.T. 77, 596 U.N.T.S. 261. Although this third obligation might be more properly termed a "right to notification," the right embodied in Article 36 as a whole is commonly referred to as the "right to consular assistance."

Obviously, the consulate can assist in very practical ways. The consulate can provide critical resources for legal representation and case investigation. Indeed, the consulate can conduct its own investigations, file amicus briefs and even intervene directly in a proceeding if it deems that necessary. Lee, Consular Law and Practice 125-88. Importantly, the consular officer may help a defendant in "obtaining evidence or witnesses from the home country that the detainee's attorney may not know about or be able to obtain." Springrose, Strangers in a Strange Land, 14 Geo. Immigr. L.J. at 196.

Sanchez-Llamas provides a good example of what a consulate can do (similar to what the Greek Consulate did for Mr. Sarras once it was contacted). In *Sanchez-Llamas*, Bustillo's defense was that another man, "Sirena," had committed the crime. Sirena, however, had fled back to Honduras; he was nowhere to be found. "Bustillo did not learn of his right to contact the Honduran consulate until after conviction, at which time the consulate located additional evidence supporting this theory, including a critical taped confession by Sirena." Mark J. Kadish & Charles C. Olson, *Sanchez-Llamas v. Oregon* and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, The Right to Consul, and Remediation, 27 Mich. J. Int'l L. 1185, 1218 (2006).

Many of the "protective functions" performed by consulates could have been brought to bear in Mr. Sarras' case, and were, after the fact, once the consulate was brought into the picture. The Greek

Consulate in Los Angeles obtained the image analysts and urologists relied upon in this petition. Without the assistance of the Greek Consulate the evidence gathered for Mr. Sarras could not have been gathered. If the Greek Consulate had been brought into the case before trial, the Greek Consulate could have done the same that it has done now and the result would have been that the outcome of the trial would have been different.

Attorney Jancha should have been aware of Mr. Sarras' rights under Article 36 of the Vienna Convention and acted to protect them. The Court and the Government should have notified Mr. Sarras of his right to contact his consulate and assisted him in doing so. It did not.

So far this Court has left it an open question whether Article 36 creates enforceable individual rights numerous lower courts have so ruled, *Standt v. City of New York*, 153 F.Supp.2d 417, 427 (S.D.N.Y.2001); *United States v. Briscoe*, 69 F.Supp.2d 738, 745-46 (D.V.I.1999); *United States v. Miranda*, 65 F.Supp.2d 1002, 1007 (D.Minn.1999); *United States v. Torres-Del Muro*, 58 F.Supp.2d 931, 933 (C.D.Ill.1999); *United States v. Hongla-Yamche*, 55 F.Supp.2d 74, 78 (D.Mass.1999); *United States v. Superville*, 40 F.Supp.2d 672, 677-78 (D.V.I.1999); *United States v. Chaparro-Alcantara*, 37 F.Supp.2d 1122, 1125 (C.D.Ill.1999); *United States v. $69,530.00 in U.S. Currency*, 22 F.Supp.2d 593, 594 (W.D.Tex.1998); *United States v. Esparza-Ponce*, 7 F.Supp.2d 1084, 1095-96 (S.D.Cal.1998) (cited in *United States v. Osagiede*, 543 F.3d 399 (7th Cir.

2008)), and the Eleventh Circuit has assumed that it does. *See Darby v. Hawk-Sawyer*, 405 F.3d 942, 946 (11th Cir. 2005) ("Assuming arguendo that § 2241 applies based on the inclusion of language concerning "treaties" and the VCCR confers an individual right to consular assistance . . . ").

A reasonably competent criminal defense lawyer would have known to seek to enforce Mr. Sarras' rights under Article 36 of the Vienna Convention. It was deficient performance on the part of attorney Jancha to not do so. As demonstrated above, Mr. Sarras was prejudiced by this deficient performance. The District Court would have been in a position to remedy the Article 36 violation before prejudice had occurred. *Cf. Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) ("The provisions of the Convention should be implemented before trial when they can be appropriately addressed"). Mr. Sarras' lawyer could have taken a simple action to remedy the Government's violation of his Article 36 rights: he could have informed the foreign national of his rights and raised the violation with the presiding judge. As the Court noted in *Sanchez-Llamas*, if a defendant "raises an Article 36 violation at trial, a court can make the appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance." *Sanchez-Llamas*, 548 U.S. at 350, 126 S.Ct. 2669, 165 L.Ed.2d 557. After being apprised of a potential violation, "a court might . . . inquire as to whether a defendant knows that he may contact his consulate; it might

even order that the prosecuting authority allow a foreign national to contact his consulate." *Mora v. New York*, 524 F.3d 183, 200 n. 24 (2d Cir. 2008). The record makes clear that Mr. Sarras' counsel failed to seek this modest remedy. This failure precluded Mr. Sarras from exercising his right to consular assistance and prejudiced him as demonstrated by the failure to obtain the needed expert resources in a timely fashion.

CONCLUSION

Based on the foregoing, Petitioner Sarras respectfully submits that he has made a substantial showing of the denial of a constitutional right as to the above issues and is entitled to the issuance of a certificate of appealability.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-15856-D

DONATOS SARRAS

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Aug. 29, 2014)

ORDER:

Danatos Sarras, proceeding through counsel, has moved for a certificate of appealability ("COA") in order to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. His motion for a COA is DENIED because he has failed to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); *Slack v McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000).

Because Sarras's motion for a COA exceeds the page limit, he has also requested leave to file excess

pages. Sarras's COA motion as been reviewed entirety, and his request exceed the page limit is, therefore, GRANTED.

/s/ William H. Pryor, Jr.
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DONATOS SARRAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CASE NO.
6:10-cv-1779-Orl-22DAB
(6:07-cr-92-Orl-22DAB)

ORDER

(Filed Oct. 28, 2013)

This case involves a motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 and an amended motion to vacate filed by Donatos Sarras (Doc. Nos. 1 & 17). The Government filed a response to the § 2255 motions in compliance with this Court's instructions and with the *Rules Governing Section 2255 Proceedings for the United States District Courts* (Doc. Nos. 8 & 19). Thereafter, Petitioner filed a reply (Doc. No. 23).

Petitioner alleges five claims for relief: (1) trial counsel was ineffective for failing to properly argue that Dr. Ferdon's opinions satisfied the *Daubert*[1] standard; (2) trial counsel was ineffective for failing to adequately investigate and call witnesses to support

[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

his defense; (3) trial counsel was ineffective for failing to object to Dr. Jablonski's testimony on *Daubert* grounds; (4) his rights under Article 36 of the Vienna Convention were violated and counsel was ineffective for failing to object to this violation of his rights; and (5) a claim of actual innocence. For the following reasons, the Court concludes that Petitioner is not entitled to relief on his claims.

I. Procedural History

Petitioner was indicted on three counts of knowingly using, inducing, or coercing a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct in violation of 18 U.S.C. § 2251(a) & (e), and one count of knowingly possessing materials containing images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) & (b)(2) (Criminal Case No. 6:07-cr-92-Orl-22DAB, Doc. No. 33).[2] A jury trial was held from November 7, 2007, through November 13, 2007, but the jury was unable to reach a verdict (Criminal Case Doc. Nos. 106, 109, 117 & 118). Petitioner was tried a second time on November 26, 2007, through November 29, 2007 (Criminal Case Doc. Nos. 152, 154, 157, & 159). The jury convicted Petitioner as charged (Criminal Case Doc. No. 167).

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[2] Hereinafter Criminal Case No. 6:07-cr-92-Orl-22DAB will be referred to as "Criminal Case."

A sentencing hearing was held on March 28, 2008 (Criminal Case Doc. No. 196). On April 10, 2008, the Court entered an Amended Judgment in the criminal case, sentencing Petitioner to three consecutive 360-month terms of imprisonment for counts one, two, and three and to a consecutive 120-month term of imprisonment for count four (Criminal Case Doc. No. 204). Petitioner appealed, and the Eleventh Circuit Court of Appeals affirmed Petitioner's convictions and sentences. *United States v. Sarras*, 575 F.3d 1191 (11th Cir. 2009).

II. Legal Standard

The Supreme Court of the United States, in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense. *Id*. at 687-88.

A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

> has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted). Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

III. Analysis

A. Claim One

Petitioner claims that trial counsel was ineffective for failing to properly argue that Dr. Ferdon's opinions satisfied the *Daubert* standard for admission of expert testimony (Doc. No. 1 at 6; Doc. No. 2 at 15). Prior to the first trial, the defense disclosed to the

Government that it intended to call Dr. Ferdon to testify that he had examined Petitioner's genitalia and Petitioner's penis contained a mole that "most certainly would have been visible in the photographs" (Criminal Case Doc. No. 72; Ex. 1).[3] Dr. Ferdon also opined that the "position and lengths of the visible dorsal vein and other superficial veins on the shaft of . . . [Petitioner's] penis are different from those of the penis in the photographs." *Id.*

The Government filed a motion in limine to exclude Dr. Ferdon's testimony (Criminal Case Doc. No. 72). The Government argued Dr. Ferdon was not qualified to testify, his opinions were not reliable or helpful, and his opinions were unduly prejudicial. *Id.* at 1. The Government asserted that Dr. Ferdon's opinion regarding Petitioner's veins, which relied on "vein-mapping," was inadmissible because it was not a reliable scientific opinion pursuant to *Daubert*. *Id.* at 7. Specifically, the Government alleged that there was no indication that vein-mapping as a means of identification was generally accepted in the medical or scientific community, had been tested, or had been subjected to peer review or publication. *Id.* at 8.

The defense opposed the motion, arguing that Dr. Ferdon has specialized training and experience due to

[3] Petitioner's defense at trial was that someone staged the images and later planted them on his computer because he did not have a sexual relationship with the victim, he did not take any sexually explicit photographs of the victim, and he was not the nude male pictured in the images.

his employment in an erectile dysfunction clinic, therefore, his opinion would be admissible under *Daubert* (Criminal Case Doc. No. 78 at 6-7). Defense counsel did not address the Government's arguments regarding vein-mapping. *Id.*

This Court granted the Government's motion, finding the expert testimony was inadmissible because no specialized knowledge was needed to compare the charged images with the photographs taken of Petitioner while in custody (Criminal Case Doc. No. 82 at 6). The Court also concluded that Petitioner failed to establish the reliability of Dr. Ferdon's methodology with regard to vein-mapping. *Id.* at n.6. However, Dr. Ferdon was allowed to testify at the second trial regarding the location of the mole on Petitioner's genitalia and that the mole would be visible in photographs taken of Petitioner's penis from an overhead position, similar to the angle of the charged images (Criminal Case Doc. No. 223 at 227-31, 237-38).

Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applies the principles and methods to the facts of the case.

See also Daubert, 509 U.S. at 589 n.7 (Rule 702 compels the district courts to perform the critical "gatekeeping" function concerning the admissibility of expert scientific evidence). The proponent of the expert testimony bears the burden to show that his expert (1) is qualified to testify competently regarding the matter which he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable; and (3) the testimony assists the trier of fact. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004).

The question at issue with regard to this claim is whether counsel rendered ineffective assistance for failing to argue that Dr. Ferdon's vein-mapping methodology is a reliable method for identification. Under *Daubert*, the reliability of an expert's methodology is determined by weighing four factors: (1) whether the expert's methodology has been tested or is capable of being tested; (2) whether the theory or technique used has been subjected to peer review and publication; (3) whether there is a known or potential error rate of the methodology; and (4) whether the technique has been generally accepted in the relevant scientific community. *United Fire & Cas. Co. v.*

Whirlpool Corp., 704 F.3d 1338, 1341 (11th Cir. 2013) (*per curiam*) (citing *Daubert*, 509 U.S. at 593-94). The Supreme Court has "emphasized that these factors are not exhaustive and are intended to be applied in a 'flexible' manner." *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)).

Petitioner claims that trial counsel could have satisfied these factors and cites to Dr. Ferdon's affidavit (Doc. No. 5, Ex. A). The affidavit lists Dr. Ferdon's qualifications as a medical doctor who solely treats adult male sexual dysfunction. *Id.* Dr. Ferdon attests that he is competent to testify as to identifying characteristics of male genitalia. *Id.* The affidavit also provides that Dr. Ferdon has expertise in evaluating and comparing male sexual physiology and anatomy due to his medical training and practice. *Id.* However, the affidavit does not contain information that shows that Dr. Ferdon's vein-mapping methodology has been tested, has been subject to peer review, whether there is a known or potential error rate, or whether the technique has been generally accepted in the relevant scientific community. Petitioner has not provided any evidence to demonstrate that Dr. Ferdon's methodology was reliable pursuant to *Daubert*; therefore, he cannot show that trial counsel was deficient with regard to this matter.[4] Furthermore, as

[4] Although Petitioner states in his reply that the reports of Dr. Goldstein and Dr. Zeitlin establish a "*Daubert* foundation" for Dr. Ferdon's testimony, the Court disagrees. Neither of the reports addresses whether "vein-mapping" or identifying genitalia

(Continued on following page)

this Court noted in its Order granting the Government's motion in limine, an expert's specialized knowledge was not needed for this matter because the jury was capable of comparing the charged photographs with the photographs of Petitioner's penis to make a determination if the genitalia were the same. *See* Fed. R. Evid. 702(a).

Alternatively, if Petitioner has properly demonstrated deficient performance on the part of counsel, he has not established prejudice. Even if the jury had heard Dr. Ferdon's testimony that he compared the charged images with the photographs of Petitioner's genitalia and concluded that the genitalia in the charged images could not belong to Petitioner due to the difference in the vein structures, there is no indication that the outcome of trial would have been different. Notwithstanding the victim's testimony that Petitioner had sexual intercourse with her and photographed her (Criminal Case Doc. No. 221 at 8-36), evidence was presented at trial that Petitioner held degrees in electrical engineering and computer science and was extremely knowledgeable regarding computers (Criminal Case Doc. No. 223 at 108-113). The forty-one charged images were found, after forensic computer investigation, on Petitioner's computer in a deleted folder which had been hidden

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via the apparent veins is a generally accepted technique in the medical community or whether this method has been tested, is subject to peer review, or has a potential error rate. *See* Doc. No. 1 at Exs. G & I.

and encrypted (Criminal Case Doc. No. 221 at 188-200). The images were deleted approximately ten minutes after the victim placed a controlled phone call to Petitioner at the request of investigators. *Id.* at 143-48, 195.

Additionally, the computer's restore points, which hold a "snapshot" of the registry files and operating system settings and files, were deleted beginning twelve minutes after the photographs were deleted. *Id.* at 206-08. The Government's computer forensic investigator testified that neither the computer's remote access nor its remote desktop had been accessed for some time. *Id.* at 213. The investigator further testified that had someone transferred the charged photographs onto Petitioner's computer using remote assistance, the transfer would have been recorded in the event logs; however, no such transfer was recorded. *Id.* at 214.

Moreover, Dr. Ferdon examined Petitioner's penis and testified regarding the location of the mole, whether it would have been visible in photographs, and whether Petitioner was manipulating or rotating his penis. Therefore, the jury heard a portion of Dr. Ferdon's testimony. However, the Government's expert contradicted Dr. Ferdon's testimony. The Government presented testimony from Dr. Jablonski, a urologist who examined Petitioner. Dr. Jablonski opined that Petitioner's mole was in such a location on his penis that it would not be visible in photographs taken from overhead, such as the charged images, unless Petitioner had manipulated or rotated

his penis, thus suggesting that in the defense photographs Petitioner had rotated his penis in order for his mole to be present (Criminal Case Doc. No. 224 at 98-108). Dr. Jablonski also testified as to the location of the veins in Petitioner's penis based on his examination of Petitioner. *Id.* at 108-110. This Court cannot conclude that had the jury heard the remainder of Dr. Ferdon's testimony regarding the veins in Petitioner's genitalia and his opinion that Petitioner was not the person depicted in the charged images that an acquittal would have resulted. Accordingly, this claim is denied.

B. Claim Two

Petitioner claims that trial counsel was ineffective for failing to adequately investigate and call witnesses to support his defense (Doc. No. 1 at 8; Doc. No. 2 at 25-33). Petitioner maintains that had trial counsel called Gerard B. Richards ("Richards"), Dr. Robert Nelson ("Dr. Nelson"), Dr. Irwin Goldstein ("Dr. Goldstein"), Dr. Scott I. Zeitlin ("Dr. Zeitlin"), and Vincente Rosado ("Rosado"), he would have been acquitted. *Id.*

1. Richards, Dr. Nelson, and Rosado

Petitioner contends that Richards, a retired agent from Federal Bureau of Investigation ("FBI"), was the head of the FBI image analysis laboratory and thus, could have testified regarding the charged images (Doc. No. 2 at 25-26). Richards' report indicates

that the person depicted in the charged images is not the same person depicted in the defense photographs (Doc. No. 1; Ex. C). Petitioner asserts that Dr. Nelson, a research scientist and professor at the California Institute of Technology in the Jet Propulsion Laboratory, has rendered expert opinions regarding image analysis on numerous occasions (Doc. No. 2 at 27-28).[5] Dr. Nelson states in his report that the charged photographs could not have been taken with the same camera, the EXIF data contained in some of the images was altered, and the person depicted in the charged images is not the same person shown in the defense photographs (Doc. No. 1; Ex. E). Petitioner also contends that trial counsel should have called Rosado, a former computer expert for the FBI, to testify that the EXIF data in the charging images is

[5] The Court notes that it is unclear whether Dr. Nelson's proposed testimony would be admissible as expert testimony. Dr. Nelson holds a bachelor's degree in physics, a master's degree in astronomy, and a doctorate in earth and planetary sciences. Although Dr. Nelson's curriculum vitae lists many qualifications and publications and states that his "research interests" include multicolor image analysis, his qualifications do not show that he has a background in computer science, photography, or any other area that would necessarily render him an expert at analyzing digital images and the EXIF data imbedded in those images. Petitioner states in his reply that Dr. Nelson specializes in "multicolor image analysis intended to maximize the information extracted from 2 and 3 dimensional multispectral images," and he processes thousands of images on a daily basis utilizing the most advanced technology (Doc. No. 23 at 18-19). The Court assumes, without deciding, that Dr. Nelson would have been accepted as an expert.

inconsistent with the camera in evidence, appears to have been altered, and suggests that the camera was not the source of the charging images (Doc. No. 1; Exs. J & K; Doc. No. 2 at 31-32).

Petitioner has not demonstrated deficient performance on the part of counsel or prejudice. Dr. Ferdon essentially testified that the person depicted in the charged images could not have been Petitioner because no mole was shown in those photographs. Therefore, Richards' and Dr. Nelson's proposed witness testimony that Petitioner was not the man in the charged images is cumulative. *See Rose v. McNeil*, 634 F.3d 1224, 1243 (11th Cir. 2011) (a defendant cannot demonstrate prejudice based on counsel's failure to raise evidence "that is merely cumulative of evidence already presented at trial."). Additionally, this Court noted in granting the Government's motion in limine with respect to Dr. Ferdon that expert testimony was unwarranted in this area because the jury was capable of comparing the charged images with the other images and determining whether the same person was depicted in the photographs.

Further, Dr. Nelson and Rosado's proposed testimony contradicts Petitioner's own witness testimony presented at trial. Doug Rehman ("Rehman") testified for the defense and stated that the charged photographs were not altered (Criminal Case Doc. No. 224 at 3-4). However, Rehman also admitted that some of the file names had EXIF data that was inconsistent with the "file naming convention" used by the camera in evidence. *Id.* at 22-23. Rehman testified that either

a different camera was used to take those photographs or someone had manually renamed those files. *Id.* at 23. Therefore, a portion of Dr. Nelson and Rosado's proposed testimony is cumulative to the testimony presented at trial. The Court concludes counsel was not deficient for failing to call witnesses whose testimony was partially in direct contradiction with, and partially cumulative to, another witness called on behalf of the defense.

Finally, there is no indication that the failure to call Richards, Dr. Nelson, and Rosado resulted in prejudice in light of the evidence presented at trial. Even if the jury heard these experts testify that Petitioner was not the man in the charged images, the charged images were not all taken on the same camera, or that the EXIF data had been altered, their testimony would not refute the fact that the charged images had been on Petitioner's computer, had been encrypted and hidden, and were deleted minutes after Petitioner received a controlled phone call from the victim. Moreover, as noted above, there was no indication that remote access or remote desktop had been used. The Court concludes that Petitioner has not shown that he would have been acquitted had counsel called these witnesses to testify. This portion of ground two is denied.

2. Drs. Goldstein and Zeitlin

Petitioner contends that counsel should have called Dr. Goldstein, a board certified urologist, to

testify that the penis depicted in the charged images was not the same as that shown in the defense photographs (Doc. No. 1; Exs. F & G; Doc. No. 2 at 29-30). Petitioner also contends that Dr. Zeitlin, professor of urology and obstetrics and gynecology at the David Geffen School of Medicine, University of California, Los Angeles, would have testified in the same manner (Doc. No. 1; Exs. H & I; Doc. No. 2 at 30-31).[6]

First, as noted above, Dr. Ferdon's testimony was that Petitioner's mole would have been present in the charged images. Therefore, Drs. Goldstein and Zeitlin's testimony would have been cumulative to that presented at trial. In addition, this Court concluded that expert testimony on the matter was not necessary because the jury was capable of comparing the photographs and making a determination of

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[6] Petitioner alleges in his reply that Dr. Ferdon told defense counsel "that he was not the right expert for this case, that the case required a urologist, preferably a board certified urologist. But [defense counsel] ignored his own expert's advice" (Doc. No. 23 at 6). Petitioner contends that reasonable counsel would have heeded the advice of an expert and obtained a board certified urologist. Petitioner states that counsel was deficient for failing to obtain the right experts for the defense. This argument is inconsistent with Petitioner's first claim in which he alleges that Dr. Ferdon was a qualified expert and should have been allowed to testify to his opinions pursuant to *Daubert*. If Dr. Ferdon was properly qualified, as Petitioner suggests, then the testimony of additional experts would have been merely cumulative to Petitioner's defense. In addition, nothing in Dr. Ferdon's affidavit suggests that he believed that he was not qualified to testify as an expert or that he advised counsel to hire a board certified urologist (Doc. No. 5).

whether Petitioner was the person depicted without expert testimony to assist them. Furthermore, even assuming counsel's actions in failing to call these witnesses amounts to deficient performance, Petitioner cannot demonstrate prejudice. As noted above, Petitioner cannot show that but for these witnesses' testimony, an acquittal would have resulted in light of the evidence presented at trial. Even if Petitioner obtained several witnesses to testify that he was not the person in the charged images, Petitioner has not refuted the other overwhelming evidence against him. Accordingly, this portion of claim two is without merit.

C. Claim Three

Petitioner alleges that trial counsel was ineffective for failing to object on *Daubert* grounds to Dr. Jablonski s testimony and the photographs that were taken of Petitioner's genitalia in his presence (Doc. No. 1 at 10; Doc. No. 2 at 40). Petitioner contends that pursuant to the reports from Drs. Goldstein and Dr. Zeitlin, Dr. Jablonski's opinion that Petitioner rotated or manipulated his penis in order for his mole to appear near the top of his penis is a medical impossibility (Doc. No. 2 at 40). Specifically, Dr. Goldstein's report indicates that penis rotation is impossible (Doc. No. 1, Ex. G). Dr. Zeitlin's report states "I am unaware of anyone being able to rotate the penis 60 degrees . . . without touching it. . . . Even with surgical intervention I would be hard pressed to explain how a man could rotate his penis 60 degrees

without touching it and then being able to hold it in place. This is physiologically impossible in both the flaccid and the erect state" (Doc. No. 1; Ex. I). Petitioner argues had counsel objected and presented the experts' affidavits, the Court would have excluded the testimony. *Id.* at 40-41.

Prior to the second trial, defense counsel moved to exclude Dr. Jablonski's testimony on the basis that his testimony did not comply with *Daubert* and that Dr. Jablonski manipulated or rotated Petitioner's penis prior to the photographs being taken despite his statements that he placed Petitioner's penis in the "neutral" position (Criminal Case Doc. No. 147). The Court denied Petitioner's motion in limine, finding Dr. Jablonski's credentials were sufficient to testify at trial (Criminal Case Doc. No. 221 at 5). The Government did not, however, present Dr. Jablonski's testimony during its case in chief. The Government presented Dr. Jablonski as a witness to rebut Dr. Ferdon's testimony that the mole on Petitioner's penis would have been visible in any photograph taken from overhead.

As an initial matter, the Court concludes that Petitioner has not demonstrated deficient performance on the part of counsel because he has not shown that any *Daubert* challenge to Dr. Jablonski's testimony would have been successful. Although one of Petitioner's experts testifies that a rotation of one's penis is impossible and the other expert testifies that

rotation would not be possible without touching the penis,[7] the expert reports do not state that an opinion that one can rotate or manipulate the skin of a penis is not a generally accepted opinion within the medical or scientific community. *United Fire*, 704 F.3d at 1341. The experts do not attest that *no* other member of the medical community holds this belief. Therefore, an objection on this basis would have been overruled and any motion in limine denied.

Further, Petitioner has not demonstrated that the photographs taken in Dr. Jablonski's presence were "in effect fabricated." Petitioner merely speculates regarding this point, and vague, conclusory, speculative, or unsupported claims cannot support an ineffective assistance of counsel claim. *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991); *Williams v. United States*, Nos. 8:09-cr-116-T-33EAJ & 8:11-cv-427-T-33EAJ, 2011 WL 3268308, at * 5 (M.D. Fla. Aug. 1, 2011).

Assuming defense counsel was deficient for failing to object to Dr. Jablonski's testimony pursuant to *Daubert*, Petitioner has not demonstrated prejudice. The jury was capable of comparing the photographs without any expert testimony on the matter to determine whether the charged images depicted

[7] The Government argued at trial that in the photographs taken by Petitioner, his hands or his expert's hands were used to rotate or manipulate his penis, whereas at Dr. Jablonski's examination and photographic session, Petitioner's penis was in the "neutral" position.

Petitioner. Moreover, even if Dr. Jablonski had not testified regarding the rotation issue, his opinion regarding the charged images was still admissible. Other evidence was presented that evinced Petitioner's guilt; namely, the fact that the charged images had been hidden, encrypted, and deleted from Petitioner's computer mere minutes after the victim completed a controlled phone call to Petitioner. Thus, there is no indication that had defense counsel successfully objected to Dr. Jablonski s testimony that the result of trial would have been different. This claim is therefore denied.

D. Claim Four

Petitioner claims that he is entitled to a new trial because his rights under the Vienna Convention were violated (Doc. No. 1 at 11-12; Doc. No. 2 at 41). Petitioner also asserts that trial counsel was ineffective for failing to object to this violation of Petitioner's rights. *Id.* It is undisputed that Petitioner is a Greek citizen. Petitioner attaches an unsworn statement from Antonios Sgouropoulos, the Consul General of Greece, in which he states that there is no record showing that the Government notified the General Consulate of Greece of Petitioner's arrest prior to his trial and conviction (Doc. No. 27-1). Petitioner alleges that had he been notified of his right to contact the consulate, he would have done so (Doc. No. 2 at 44). Additionally, Petitioner contends that counsel should have contacted the consulate because it would have

helped the defense obtain experts witnesses, specifically, those mentioned in claim two. *Id.*

Article 36 of the Vienna Convention on Consular Relations provides in relevant part:

> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

Vienna Convention on Consular Relations, art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 101, T.I.A.S. No. 6820.

The Supreme Court of the United States has stated in *Breard v. Greene*, 523 U.S. 371, 377 (1998), that "it is extremely doubtful that . . . [a violation of the Vienna Convention] should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." The *Breard* Court further noted that the petitioner's claim of prejudice was speculative and did not warrant relief. *Id.* Subsequently, the Eleventh Circuit has denied relief pursuant to *Breard* when a petitioner failed to demonstrate that the alleged violation of the Vienna Convention had a prejudicial effect on the

trial. *See Darby v. Hawk-Sawyer*, 405 F.3d 942, 946 (11th Cir. 2005); *see also Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347 (2006) (concluding that violation of Vienna Convention does not warrant suppression of evidence). The Eleventh Circuit has also indicated that relief from conviction is not an available remedy for a violation of the Vienna Convention. *See Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1307 (11th Cir. 2005) (noting that "the Vienna Convention does not confer judicially enforceable *individual rights*" and "the only remedies for a violation of the Vienna Convention are diplomatic, political, or derived from international law.") (citations omitted); *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002) (citing *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1195-96 (11th Cir. 2000)).

Pursuant to the above authorities, Petitioner cannot obtain relief from his conviction due to the alleged violation of his rights under the Vienna Convention. Furthermore, to the extent that Petitioner can obtain relief, the Court concludes that Petitioner has not demonstrated prejudice. Although Petitioner states that the Greek Consulate would have investigated and hired the experts listed at claim two, this Court found that there was no reasonable probability that the outcome of trial would have been different had counsel called the proposed witnesses to testify. Accordingly, claim four is denied.

E. Claim Five

Petitioner claims that he is actually innocent of his conviction (Doc. No. 1 at 13; Doc. No. 2 at 47). In his amended § 2255 motion, Petitioner argues that he is actually innocent of the charged offenses because an essential element of the offense was not satisfied in his case, and counsel was ineffective for failing to object on this basis (Doc. No. 17 at 2).[8]

"Actual innocence is not itself a substantive claim, but rather serves only to lift . . . [a] procedural bar. . . ." *United States v. Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005) (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)); *see also Schlup v. Delo*, 513 U.S. 298, 315 (1995) ("[A] claim of innocence is . . . 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). Therefore, the Court will not consider Petitioner's claim.

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[8] To the extent that Petitioner raised this new claim of ineffective assistance of counsel in his amended § 2255 motion, the Court concludes that it is untimely filed and cannot be considered unless it relates back to Petitioner's original § 2255 motion. *See Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000); Fed. R. Civ. P. 15(c). Petitioner's claim that counsel failed to object because an essential element of the crimes was not proved does not expand upon or cure deficiencies in the original motion and instead states a new claim based on different facts. Therefore, this claim does not relate back to the original § 2255 motion and will not be considered.

Notwithstanding the bar to Petitioner's actual innocence claim, the Court concludes that Petitioner has failed to establish a colorable claim of innocence. Actual innocence means factual innocence, not legal insufficiency. *Bousley*, 523 U.S. at 623. To meet this standard, a petitioner must "show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327; *see also House v. Bell*, 547 U.S. 518, 537 (2006). Petitioner has not demonstrated the existence of any newly discovered evidence. Even if Petitioner's new witness testimony is considered "newly discovered," Petitioner has not established factual innocence; at best he shows mere legal insufficiency. *Schlup*, 513 U.S. at 324. Accordingly, Petitioner's actual innocence claim fails.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. Petitioner's motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 1) and amended motion to vacate, set aside, or correct an illegal sentence (Doc. No. 17) are **DENIED**.

2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

3. The Clerk of Court is directed to file a copy of this Order in criminal case number 6:07-cr-92-Orl-22DAB and to terminate the motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Criminal Case Doc. No. 292) pending in that case.

4. This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). Petitioner has failed to make a substantial showing of the denial of a constitutional right.[9] Accordingly, a certificate of appealability is **DENIED** in this case.

DONE AND ORDERED in Orlando, Florida, this 28th day of October, 2013.

/s/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies to:
OrlP-3 10/28
Counsel of Record

[9] Pursuant to the *Rules Governing Section 2255 Proceedings for the United States District Court*, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2255 Proceedings, Rule 11, 28 U.S.C. foll. § 2255.