

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2001

Kenneth Gaylord Stokes

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:16-cv-03358-MDH)

JUDGMENT

Before LOKEN, BOWMAN and BENTON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

October 17, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APP - A

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

KENNETH GAYLORD STOKES,)
)
)
Movant,)
)
)
v.) Case No. 16-03358-CV-S-MDH-P
) Case No. 12-03091-01-CR-S-MDH
UNITED STATES OF AMERICA,)
)
)
Respondent.)

ORDER

Before the Court is Kenneth Stokes' ("Movant") Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. Movant is incarcerated at the United States Penitentiary in Tucson, Arizona. He seeks relief from a 120-year sentence imposed on August 4, 2015. The Court, having considered the parties' arguments, and for good cause shown, DENIES said Motion and DENIES a certificate of appealability.

BACKGROUND

On July 4, 2012, an undercover agent began an e-mail exchange with Movant after seeing his advertisements for "photography services in the Philippines" on Craigslist. Crim. Doc. 55 at 2.¹ Movant sent the agent three photographs "depicting a juvenile female in sexually suggestive . . . poses," which eventually escalated to Movant sending the agent "two photos depicting nude juvenile females displaying their genitals in a lewd and lascivious manner." *Id.* The e-mail exchange continued for several months, and Movant "indicated [to the agent] that he would help facilitate sexual liaisons [in the Phillipines.]" *Id.* at 2-3.

¹"Crim. Doc." refers to the docket number entries in Movant's criminal case, Case No. 12-03091-01-CR-S-MDH. "Doc." refers to the docket number entries in Movant's civil case, Case No. 16-03358-CV-S-MDH-P. Page number citations refer to the page numbers assigned by the CM/ECF electronic docketing system.

The agent traveled to the Philippines to meet with Movant in December of 2012. *Id.* at 3. Movant invited the agent to his home, where he showed the agent “multiple pictures of children engaged in sexually explicit conduct” on his laptop. *Id.* Local and American authorities then took Movant into custody. *Id.* During questioning, Movant “confessed to using multiple minor females to produce child pornography.” *Id.* A forensic examination of Movant’s laptop revealed “stored images depicting child pornography.” *Id.* At least five minor females in the photographs were identified and questioned. *Id.* Each one identified Movant as the photographer who took photographs of them and stated that they had received money as compensation. *Id.*

On November 7, 2012, a grand jury returned a two-count indictment against Movant, charging him with two counts of distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2) and (b)(1). Crim. Doc. 1. On June 12, 2013, the Government presented a superseding indictment to the grand jury, and the grand jury returned a true bill. Crim. Doc. 22 at 3. The superseding indictment charged Movant with the original counts, as well as five additional counts of engaging in illicit sexual conduct in a foreign place, in violation of 18 U.S.C. § 2423(c) and 2426(a). *Id.* at 1-3.

On January 27, 2015, Movant pleaded guilty pursuant to a plea agreement to counts Three through Seven, each charging him with engaging in non-commercial illicit sexual conduct in a foreign place, in violation of 18 U.S.C. § 2423(c) and 2426(a). Crim. Doc 54; Doc. 6 at 5. The Court sentenced Movant on August 4, 2015, to 120 years’ imprisonment, followed by a life term of supervised release. Crim. Doc. 63 at 2-3.

On August 29, 2016, Movant *pro se* filed this Section 2255 habeas motion seeking relief from his sentences for violations of 18 U.S.C. § 2423(c). Doc. 1.

STANDARD

A prisoner may move for the court to vacate, set aside, or correct the sentence imposed on the prisoner by alleging “that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]” 28 U.S.C. § 2255. A claim of ineffective assistance of counsel may be sufficient to attack a sentence under section 2255; however, the “movant faces a heavy burden.”

United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996).

In such cases, the Court must review an ineffective assistance of counsel claim under the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* Under *Strickland*, a prevailing defendant must prove “both that his counsel’s representation was deficient and that the deficient performance prejudiced the defendant’s case.” *Cheek v. United States*, 858 F.2d 1330, 1336 (8th Cir. 1988). As to the “deficiency” prong, the defendant must show that counsel “failed to exercise the customary skills and diligence that a reasonably competent attorney would [have] exhibit[ed] under similar circumstances.” *Id.* (quoting *Hayes v. Lockhart*, 766 F.2d 1247, 1251 (8th Cir. 1985)). Courts are highly deferential to the decisions of counsel and there is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689. Key to this case, an attorney is not deficient for failing to raise a meritless claim. *Thomas v. United States*, 951 F.2d 902, 904 (8th Cir. 1991). Nor is counsel deficient for “failing to anticipate a change in the law.” *Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999).

As to the “prejudice” prong, the defendant must show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have

been different.” *Cheek*, 858 F.2d at 1336 (quoting *Strickland*, 466 U.S. at 694). “In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice.” *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012).

ANALYSIS

For the reasons set forth below, the Court finds that Movant fails to meet his “heavy burden” to prove ineffective assistance of counsel such that his sentence should be vacated, set aside, or corrected pursuant to 28 U.S.C. § 2255.

A. “Deficiency” Prong

Movant contends that his plea counsel provided ineffective assistance because plea counsel failed to challenge the constitutionality of 18 U.S.C. § 2423(c), the statute that Movant pleaded guilty to violating. Doc. 1 at 5. Specifically, Movant asserts that plea counsel should have challenged Section 2423(c) on its face, on the ground that Congress does not have the authority to regulate non-commercial illicit sexual conduct. Doc. 1 at 5 (“[Section 2423(c)] exceeds Congress’ authority under the Foreign Commerce Clause.”); Doc. 8 at 3. But as explained below, because every circuit court to examine the issue has held that Section 2423(c) is constitutional, Movant cannot establish that plea counsel was ineffective for failing to raise a questionable constitutional claim. *See Thomas*, 951 F.2d at 904; *Parker*, 188 F.3d at 929.

As an initial matter, the Court notes that “[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully” *United States v. Salerno*, 481 U.S. 739, 745 (1987). “To prevail on a facial challenge, [a party] must show that [Section 2423(c)] would be unconstitutional in all of its applications.” *Neely v. McDaniel*, 677 F.3d 346, 352 (8th Cir. 2012). If there are “many applications of [Section 2423(c)] that pass constitutional muster,” then the Court “need not decide whether the statute would be constitutional as applied

to [a party.]” *Id.* Here, Movant essentially contends that his plea counsel was deficient for failing to succeed in the most difficult type of statutory challenge.

Section 2423(c) provides that “[a]ny United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.” The phrase “illicit sexual conduct” is defined as:

(1) a sexual act (as defined in § 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; (2) any commercial sex act (as defined in 18 U.S.C. § 1591) with a person under 18 years of age; or (3) production of child pornography

18 U.S.C. § 2423(f)(1)-(3).

Even though the Eighth Circuit has not ruled on the constitutionality of Section 2423(c), several circuits have thoroughly examined and upheld its constitutionality. *United States v. Bollinger*, 798 F.3d 201 (4th Cir. 2015); *United States v. Pendleton*, 658 F.3d 299 (3d Cir. 2011); *United States v. Clark*, 435 F.3d 1100, 1116-17 (9th Cir. 2006); *see also Phillips v. United States*, 734 F.3d 573, 576 n.2 (6th Cir. 2013).² Additionally, the only circuit court to question,

² The Third Circuit’s reasoning rested on Section 2423(c)’s regulation of non-commercial conduct that nonetheless had an “express connection” to the channels of foreign commerce”:

Congress enacted § 2423(c) to regulate persons who use the channels of commerce to circumvent local laws that criminalize child abuse and molestation. And just as Congress may cast a wide net to stop sex offenders from traveling in interstate commerce to evade state registration requirements, so too may it attempt to prevent sex tourists from using the channels of foreign commerce to abuse children.

Pendleton, 658 F.3d at 311.

The Fourth Circuit found that Section 2423(c) was constitutional because the non-commercial conduct at issue had a “demonstrable effect” on the commercial sex industry: “It is eminently rational to believe that prohibiting the non-commercial sexual abuse of children by Americans abroad has a demonstrable effect on sex tourism and the commercial sex industry . . . [and Section 2423(c) acts] as a tool to close statutory ‘loopholes’ that affected commercial sex tourism.” *Bollinger*, 798 F.3d at 218.

but not analyze, the constitutionality of the statute, held that it is “not obviously unconstitutional.” *See United States. v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015). Thus, Movant cannot establish that a facial challenge would have succeeded.

Accordingly, because plea counsel is not deficient for failing to raise meritless claims, *see Thomas*, 951 F.2d at 904, or for failing to anticipate a change in the law, *see Parker*, 188 F.3d at 929, Movant fails to establish the “deficiency” prong of the *Strickland* test.

B. “Prejudice” Prong

Movant contends that, had his plea counsel “successfully” challenged the constitutionality of Section 2423(c), he would not have pleaded guilty. Doc. 1 at 5. Even assuming that counsel was deficient for failing to challenge the constitutionality of the statute, however, Movant has not established prejudice. To that end, as noted above, Movant must show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cheek*, 858 F.2d at 1336 (quoting *Strickland*, 466 U.S. at 694. Given that every circuit court to confront the issue has determined that the provision is constitutional, Movant has not met the high burden of establishing a reasonable probability that but for counsel’s error, the result of his proceeding would have been different.

C. Movant’s Motions for Leave to Supplement (Docs. 9, 10)

After briefing was complete, Movant filed two motions for leave to supplement his Section 2255 motion. (Docs. 9, 10). In those filings, Movant contends, *inter alia*, that he is “actually innocent based on two ex post facto violations.” Doc. 9 at 1. New issues cannot be raised for the first time in a Section 2255 reply brief. *Smith v. United States*, 256 Fed. App’x. 850, 852 (8th Cir. 2007). Additionally, these claims do not relate back to the original motion.

See Taylor v. United States, 792 F.3d 865, 869 (8th Cir. 2015) (“New claims must arise out of the ‘same set of facts’ as the original claims, and ‘[t]he facts alleged must be specific enough to put the opposing party on notice of the factual basis for the claim.’”). Regardless, the Court has reviewed the claims raised in this filing *ex gratia* and sees no basis for relief. Accordingly, Movant’s motion for leave to supplement is DENIED.

EVIDENTIARY HEARING AND CERTIFICATE OF APPEALABILITY

“A petitioner is entitled to an evidentiary hearing on a section 2255 motion unless the motion and the files and the records of the case conclusively show that he is entitled to no relief.” *Anjulo-Lopez v. U.S.*, 541 F.3d 814, 817 (8th Cir. 2008) (quotations omitted). Where the claims are inadequate on their face or if the record affirmatively refutes the factual assertions upon which the claims are based, no hearing is required. *Id.* Based on the above, the Court finds no hearing is required because Movant has failed to make the requisite factual showings, supported by the record, on any of his § 2255 claims.

Moreover, Movant has not made a sufficient showing for the issuance of a certificate of appealability. If the Court denies a § 2255 motion, the movant can appeal only if the Court issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2013). A certificate of appealability should be issued only if the movant has made a substantial showing of the denial of a constitutional right or raise an issue debatable among jurists of reason or deserving of further proceedings. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Court finds Movant has not made this substantial showing, such that a certificate of appealability shall not be issued as to any of the claims raised by Movant’s Motion. *See Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997).

CONCLUSION

The Court has carefully considered the parties' arguments and the record. For good cause shown and for the reasons stated above, it is hereby ORDERED that

- (1) Movant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 1) is DENIED.
- (2) Movant's motion for leave to file a supplemental motion is DENIED;
- (3) A certificate of appealability shall not be issued.

IT IS SO ORDERED.

/s/ Douglas Harpool
DOUGLAS HARPOOL
UNITED STATES DISTRICT JUDGE

DATED: February 28, 2017

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JUDGMENT IN A CIVIL CASE

Kenneth Gaylord Stokes,

Movant,

v.

Case No. 16-03358-CV-S-MDH-P
Case No. 12-03091-01-CR-S-MDH

United States of America,

Respondent.

- JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- DECISION OF THE COURT.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: ORDERED that

- (1) Movant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 1) is DENIED.
- (2) Movant's motion for leave to file a supplemental motion is DENIED;
- (3) A certificate of appealability shall not be issued.

Entered on: February 28, 2017.

PAIGE WYMORE-WYNN
CLERK OF COURT

/s/ C. Thoennes
(By) Deputy Clerk

**UNITED STATES COURT OF APPEALS
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No: 17-2001

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MANDATE

In accordance with the judgment of 10/17/2017, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

December 08, 2017

Clerk, U.S. Court of Appeals, Eighth Circuit

APP-B