UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3701

James Eugene Larive, Jr.

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(5:16-cv-05078-JLV)

JUDGMENT

Before GRUENDER, BOWMAN and KELLY, 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.

April 04, 2018

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

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

JAMES EUGENE LARIVE, JR., Movant, vs. UNITED STATES OF AMERICA, Respondent.	CIV. 16-5078-JLV [CR-13-50100-JLV] ORDER

Petitioner James Eugene Larive, Jr., appearing *pro se*, filed a motion (Docket 1) pursuant to 28 U.S.C. § 2255 ("2255 motion") to vacate or set aside his criminal conviction in United States v. James Eugene Larive, Jr., CR. 13-50100-JLV. (Docket 1). The government filed an answer opposing the 2255 motion and a motion to dismiss the 2255 Motion for failing to state a claim. (Dockets 9 & 10). Pursuant to a standing order of October 16, 2014, the matter was referred to United States Magistrate Judge Veronica L. Duffy pursuant to 28 U.S.C. § 636(b)(1)(B). Judge Duffy issued a report recommending the court deny all of Mr. Larive's claims in the 2255 Motion. (Docket 13). Mr. Larive timely filed his objections. (Docket 14). After the deadline established for filing objections, Mr. Larive filed a number of supplemental submissions. (Dockets 15, 16, 17, 18 & 21). For the reasons stated below, Mr. Larive's 2255 motion is denied.

ANALYSIS

The court reviews *de novo* those portions of the report and recommendation which are the subject of objections. Thompson v. Nix, 897 F.2d 356, 357-58 (8th Cir. 1990); 28 U.S.C. § 636(b)(l). The court may then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

The court reviewed the record in this case *de novo* and carefully considered Mr. Larive's objections to the report and recommendation. The court finds Mr. Larive's objections are without merit. Each of Mr. Larive's objections are repetitive of the arguments made initially in support of the 2255 motion and rejected in the report and recommendation. Compare Dockets 1, 13 & 14. Each of the grounds for relief alleged in the 2255 motion was resolved either on direct appeal in United States v. Larive, 794 F.3d 1016 (8th Cir. 2015) or thoroughly analyzed and rejected by the magistrate judge in the report and recommendation.[1]

The court finds the report and recommendation is an accurate and thorough recitation of the facts and applicable case law. The court further finds the magistrate judge's legal analysis is well-reasoned. The court adopts and

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[1]Mr. Larive's supplemental filings were not timely submitted following the report and recommendation, which provides an additional basis for rejecting their arguments. See Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 619-20 (8th Cir. 2009) (failing to submit an objection on time waives the right to review by the district court); see also United States v. Diaz-Rosado, 857 F.3d 89, 94 (1st Cir. 2017) ("Diaz waived his right to bring the challenge he now advances by failing to file objections to the Magistrate Judge's report and recommendation.").

incorporates the report and recommendation in full and overrules Mr. Larive's objections for the same reasons set forth in the report and recommendation.

ORDER

Having carefully reviewed the record in this case and good cause appearing, it is

ORDERED that Mr. Larive's objections (Docket 14) are overruled.

IT IS FURTHER ORDERED that the report and recommendation (Docket 13) is adopted in full.

IT IS FURTHER ORDERED that the government's motion to dismiss (Docket 9) is granted.

IT IS FURTHER ORDERED that Mr. Larive's petition (Docket 1) is dismissed with prejudice.

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. § 2253(c) and Rule 11 of the Rules Governing Section 2255 Cases in the United States District Courts, the court declines to issue a certificate of appealability. A certificate may issue "only if the applicant has made a *substantial showing* of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (emphasis added). A "substantial showing" under this section is a showing that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). In other words, a "substantial showing" is made if a "court could resolve the issues differently, or the issues deserve further proceedings." Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997).

Mr. Larive has not made a substantial showing of the denial of a constitutional right.

Although the court declines to issue a certificate of appealability, Mr. Larive may timely seek a certificate of appealability from the United States Court of Appeals for the Eighth Circuit under Fed. R. App. P. 22. See Rule 11(a) of the Rules Governing Section 2255 Cases in the United States District Courts and Fed. R. App. P. 22.

Dated November 21, 2017.

BY THE COURT:

/s/ *Jeffrey L. Viken*
JEFFREY L. VIKEN
CHIEF JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

JAMES EUGENE LARIVE, JR., Movant, vs. UNITED STATES OF AMERICA, Respondent.	CIV. 16-5078-JLV JUDGMENT

Consistent with the court's order (Docket 22), it is

ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of respondent and against movant.

Dated November 21, 2017.

BY THE COURT:

/s/ *Jeffrey L. Viken*
JEFFREY L. VIKEN
CHIEF JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

JAMES EUGENE LARIVE, JR., Movant, vs. UNITED STATES OF AMERICA, Respondent.	5:16-CV-05078-JLV REPORT & RECOMMENDATION

INTRODUCTION

This matter is pending before the court on the *pro se* motion of James Eugene Larive, Jr. to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. See Civ. Docket No. 1.[1] This matter was referred to this magistrate judge pursuant to the October 16, 2014, standing order of the Honorable Jeffrey L. Viken, Chief Judge, and pursuant to 28 U.S.C. § 636(b)(1)(A) and (B). Pending is a motion to dismiss by respondent the United States of America ("government"). See Civ. Docket No. 9. Mr. Larive resists the motion. See Civ. Docket No. 12.

[1] Documents from this civil § 2255 action are cited "Civ." and documents from Mr. Larive's underlying criminal prosecution, United States v. Larive, 5:13-cr-50100-JLV (D.S.D.), are cited "CR."

FACTS

Mr. Larive was indicted on August 13, 2013, on one count of commercial sex trafficking in violation of 18 U.S.C. §§ 1591(a)(1), 1591(b)(1) and 1594(a). See CR Docket No. 1. The indictment alleged Mr. Larive knowingly attempted to recruit, entice, and obtain a person under the age of 18, knowing and recklessly disregarding that the person was a minor and would be caused to engage in a commercial sex act. Id. Mr. Larive made his initial appearance on this indictment on August 19, 2013. See CR Docket No. 6. An assistant Federal Public Defender was appointed to represent Mr. Larive and he was detained. See CR Docket Nos. 8 & 9. Mr. Larive was granted pretrial release eight days later on August 27, 2013. See CR Docket No. 18. Mr. Larive's lawyer filed a request for notice from the government if it intended to introduce evidence at trial under Federal Rule of Evidence 404(b).[2] See CR Docket No. 12.

Mr. Larive privately retained attorney Ellery Grey on September 30, 2013. See CR Docket No. 24. Mr. Grey represented Mr. Larive for the remainder of his criminal case and direct appeal.

On March 4, 2014, the government filed a notice of its intent to introduce evidence pursuant to FED. R. EVID. 404(b). See CR Docket No. 34. Specifically, the government noticed its intent to introduce evidence that Mr. Larive had

[2] Under Rule 404(b), evidence of a crime, wrong, or other act may not be used to prove a person's character so as to show he or she acted in accordance with that character on a particular occasion. See FED. R. EVID. 404(b)(1). Such evidence *may* be introduced, however, to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. See FED. R. EVID. 404(b)(2).

previously sent an email to Wyoming and South Dakota law enforcement agents attempting to engage in sex with a prostitute who was 12 years old. Id.; CR Docket No. 35 at 2. The government stated it expected Mr. Larive may assert as defenses at trial (1) a claim he was unaware of the age of the victim or was merely engaging in fantasy and did not intend to solicit a minor for commercial sex; (2) that he was entrapped by law enforcement; or (3) that he was misidentified as the person who had engaged in online chats with law enforcement. See CR Docket No. 35 at 1. The government outlined its 404(b) evidence as follows: Wyoming law enforcement initially placed an internet ad for commercial sex, posing as a 35-year old mother with a 12-year old daughter. Id. at 2. Mr. Larive responded to the ad with interest. Id. The law enforcement agent repeatedly told Mr. Larive the "daughter" was 12, and Mr. Larive continued to seek to meet the "daughter" to obtain commercial sex. Id. Mr. Larive told law enforcement he did not have cash to pay for the sex, but offered to pay with cell phones and camcorders instead. Id. at 3.

The government asserted the 404(b) evidence was relevant to prove intent, and to disprove Mr. Larive's possible innocent explanations for the charged crime and general denials of committing the crime. Id. at 5. Furthermore, the 404(b) act occurred within days of the conduct alleged in the indictment and, in both instances, Mr. Larive sought commercial sex with a minor and offered to pay with a cell phone or camcorder. Id. at 6-7.

Defense counsel objected to the government's 404(b) evidence on the grounds that it would be *unfairly* prejudicial to Mr. Larive. See CR Docket

No. 39 at 1-2. In preparation for trial, defense counsel filed a motion *in limine* seeking to prohibit the introduction of opinion evidence as to the credibility of Mr. Larive's custodial statement. See CR Docket No. 47 at 1. Counsel also sought to prohibit the government from using a separate 404(b) act in which Mr. Larive said he had gotten "into trouble" when he was a "little kid" over "a little girl." Id. at 2.

At the pretrial conference, the district court overruled Mr. Larive's objection to the government's noticed 404(b) evidence. See CR Docket No. 50 at 3. The court granted both of Mr. Larive's motions *in limine*. Id.

Mr. Larive's jury trial began on April 1, 2014, and continued until April 4, 2014, when the jury returned a guilty verdict against Mr. Larive on the single count in the indictment. See CR Docket No. 58. The district court sentenced Mr. Larive on July 22, 2014, to 120 months' imprisonment. See CR Docket No. 64 at 2. Mr. Larive timely appealed. See CR Docket No. 69.

On appeal, Mr. Larive argued the evidence at trial was insufficient to sustain his conviction because he abandoned the attempt to engage in the commercial sex transaction before taking a substantial step toward completion of the offense. United States v. Larive, 794 F.3d 1016, 1017 (8th Cir. 2015). The court affirmed Mr. Larive's conviction and sentence. Id. at 1020. The court explained the law of attempt as follows:

> A substantial step must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the crime. . . In order for behavior to be punishable as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing

> it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute.

Id. at 1019 (quoting United States v. Mims, 812 F.2d 1068, 1077 (8th Cir. 1987)).

In prior cases involving a violation of 18 U.S.C. § 2422(b), using a facility of interstate commerce to entice a minor to engage in illegal sexual activity, the court had held that (1) negotiating over the internet and (2) driving to the agreed-upon scene of a meeting were each, individually, sufficient to constitute a "substantial step" as required by attempt law. Id. The court held if these acts were sufficient to constitute a substantial step under the interstate facilities statute, the acts were also sufficient to constitute a substantial step under the commercial sex act statute applicable to Mr. Larive. Id. at 1019-20.

The evidence in Mr. Larive's case showed that he negotiated over the internet for the purchase of a commercial sex act in exchange for a cell phone, a step Mr. Larive admitted occurred. Id. at 1017-18. Mr. Larive subsequently drove to the agreed-upon meeting place, then left without consummating the transaction or making contact, acts which he also admitted. Id. at 1018. When police arrested him shortly after he left the meeting place, he had in his possession a cell phone. Id. Having completed the actions necessary for an attempt (the negotiation and the travel to the meeting place), the Eighth Circuit held Mr. Larive was not entitled to an abandonment defense based upon his departure from the scene of the meeting place thereafter. Id. at 1020. In other words, the court held that by the time Mr. Larive abandoned his course of action, he had already performed the acts necessary for conviction of an

attempt. Id. See also United States v. Young, 613 F.3d 735, 746 (8th Cir. 2010) ("when a defendant has completed the crime of attempt; i.e., has the requisite intent and has taken a substantial step toward completion of the crime, he cannot successfully abandon the attempt because the crime itself has already been completed").

Mr. Larive timely filed his instant motion to vacate, correct or set aside his sentence on August 29, 2016.[3] See Civ. Docket No. 1. Mr. Larive asserts four claims for relief. First, he argues his trial counsel was ineffective in failing to raise an entrapment defense both at the trial level and on direct appeal. Id. at 5-9. Second, Mr. Larive asserts the indictment and the evidence adduced at trial was insufficient to convict him of attempted commercial sex trafficking. Id. at 10-15. Third, Mr. Larive argues the district court should have granted his motion for judgment of acquittal. Id. at 17-19. Finally, Mr. Larive argues the district court erred by failing to follow the United States Sentencing Guidelines (USSG) sentencing table. Mr. Larive asserts the court should have sentenced him to a term of 97 months' imprisonment, instead of 120 months. Id. at 19-20.

[3] The Eighth Circuit issued its mandate on August 19, 2015. See CR Docket No. 90. Mr. Larive had one year plus 90 days from August 19, 2015, to file his § 2255 motion. See 28 U.S.C. § 2255(f); Clay v. United States, 537 U.S. 522, 527 (2003) (§ 2255's one-year limitation period begins running "when [the Supreme] Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). Therefore, Mr. Larive's August 29, 2016, filing was within the one-year limitations period.

The government now moves to dismiss Mr. Larive's motion, arguing he has failed to state any claim upon which relief may be granted. See Civ. Docket No. 9. Mr. Larive resists the motion. See Civ. Docket No. 12.

DISCUSSION

A. Scope of a § 2255 Motion

Section 2255 of Title 28 of the United States Code was enacted to supersede habeas corpus practice for federal prisoners. Davis v. United States, 417 U.S. 333, 343-44 (1974). Section "2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." Id. at 343. Prior to the enactment of § 2255, habeas claims had to be brought in the district where the prisoner was confined, resulting in overburdening those districts where federal correctional institutions were located and presented logistical issues because the record in the underlying criminal case were often in a distant location. United States v. Hayman, 342 U.S. 205, 212-16 (1952). The enactment of § 2255 resolved these issues by requiring that the motion be filed in the sentencing court. Id.

The scope of a § 2255 motion is seemingly broader than the scope of a habeas petition, the latter of which is typically limited to allegations of a constitutional dimension. Section 2255 allows a federal prisoner to "vacate, set aside or correct" a federal sentence on the ground 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." See 28 U.S.C. § 2255. Where the allegation for relief is *not* based on a violation of a Constitutional or federal statutory right or an assertion that the court was without jurisdiction, the Supreme Court has read a "fundamentality" requirement into § 2255. Relief is available for only those errors which constitute a "fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962); see Peguero v. United States, 526 U.S. 23, 27-30 (1999).

Generally, petitioners are precluded from asserting claims pursuant to § 2255 that they failed to raise on direct appeal. United States v. Frady, 456 U.S. 152, 167-68 (1982); McNeal v. United States, 249 F.3d 747, 749 (8th Cir. 2001). When a § 2255 petitioner asserts a claim that is procedurally defaulted because it was not raised on direct appeal, the claim can only proceed after the petitioner has shown either: (1) actual innocence or (2) that the procedural default should be excused because there was both cause for the default and actual prejudice to the petitioner. Bousley v. United States, 523 U.S. 614, 621-22 (1998); McNeal, 249 F.3d at 749. Therefore, barring a claim of actual innocence, a petitioner must show both cause for why he failed to raise an issue on direct appeal as well as actual prejudice caused by the alleged errors.

Appellate courts generally refuse to review claims of ineffective assistance of counsel on direct appeal; such claims are, therefore, properly addressed in a 28 U.S.C. § 2255 motion such as the one here. See United States v. Campbell, 764 F.3d 880, 892-93 (8th Cir. 2014); United States v. Lee, 374 F.3d 637, 654

(8th Cir. 2004) (ineffective assistance of counsel claims are not generally cognizable on direct appeal and will be heard only to prevent a miscarriage of justice or in cases where the district court has developed a record on the issue). Therefore, no procedural default analysis is required before examining petitioner's claims of constitutionally-deficient counsel.

B. Ineffective Assistance of Counsel Claims

1. The Strickland Standard

As indicated above, because ineffective assistance of counsel claims will not usually be heard on direct appeal, the first and only place to raise them is in a collateral review proceeding like this one. See Campbell, 764 F.3d at 892-93; Lee, 374 F.3d at 654. Thus, the procedural default doctrine has no applicability to these claims.

The Sixth Amendment of the Constitution of the United States affords a criminal defendant with the right to assistance of counsel. U.S. Const. amend. VI. The Supreme Court "has recognized that 'the right to counsel is the right to effective assistance of counsel.' " Strickland v. Washington, 466 U.S. 668, 698 (1984) (citing McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970)). Strickland is the benchmark case for determining if counsel's assistance was so defective as to violate a criminal defendant's Sixth Amendment rights and require reversal of a conviction. Id. at 687. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. The defendant must also show that counsel's

unreasonable errors or deficiencies prejudiced the defense and affected the judgment. Id. at 691. The defendant must show, "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695. In sum, a defendant must satisfy the following two-prong test. Id. at 687.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

"There is a presumption that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment." Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002). It is the petitioner's burden to overcome this presumption, and a "petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." Id.

Counsel's conduct must be judged by the standards for legal representation which existed at the time of the representation, not by standards promulgated after the representation. Bobby v. Van Hook, 558 U.S. 4, 7-9 (2009). American Bar Association standards and similar directives to lawyers are only guides as to what reasonableness of counsel's conduct is, they

are not its definitive definition. Id. The Supreme Court distinguishes between those cases in which the new evidence "would barely have altered the sentencing profile presented to the sentencing judge," and those that would have had a reasonable probability of changing the result. Porter v. McCollum, 558 U.S. 30, 41 (2009). In assessing the prejudice prong, it is important for courts to consider "the totality of the available mitigation evidence 'both that adduced at trial, and the evidence adduced in the habeas proceeding' " and "reweigh it against the evidence in aggravation." Id. at 40-41. It is not necessary for the petitioner to show "that counsel's deficient conduct more likely than not altered the outcome" of his case, only that there is "a probability sufficient to undermine confidence in [that] outcome." Id. at 44. Judicial scrutiny of attorney performance is highly deferential, with a strong presumption that counsel's conduct falls within the range of reasonable professional conduct. Strickland, 466 U.S. at 698.

2. Failure to Raise Entrapment Defense at Trial

The evidence shows trial counsel *did* raise the issue of entrapment at the trial level. Counsel proposed an entrapment jury instruction. See CR Docket No. 46 at 2. He argued entrapment in his closing argument. See CR Docket No. 77 at 187. The district court gave the jury an instruction on entrapment at the conclusion of the trial. See CR Docket No. 52 at 9. Therefore, to the extent Mr. Larive is asserting counsel was ineffective for failing to raise the entrapment defense at the trial level, that claim is denied because it lacks support in the record.

3. Failure to Raise Entrapment Issue on Direct Appeal

Mr. Larive also appears to argue that counsel was ineffective because he did not raise the issue of the entrapment defense on direct appeal. "The Sixth Amendment does not require that counsel raise every colorable or non-frivolous claim on appeal." New v. United States 652 F.3d 949, 953 (8th Cir. 2011) (citing Roe v. Delo, 160 F.3d 416, 418 (8th Cir. 1998)). "[A]bsent contrary evidence, we assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." Id. (quoting United States v. Brown, 528 F.3d 1030, 1033 (8th Cir. 2008)). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal." Id. at 954 (quoting Brown, 528 F.3d at 1033). Failure to raise a weak argument on appeal is not deficient conduct by appellate counsel. New, 652 F.3d at 954.

Entrapment is a question of fact for the jury to decide.[4] United States v. Young, 613 F.3d 735, 746 (8th Cir. 2010). A defendant is entitled to a jury instruction on entrapment if there is enough evidence for a reasonable jury to find entrapment. Id. There are two elements to an entrapment defense: (1) that the government induced the crime and (2) that the defendant had no predisposition to commit the crime. Id. The defendant must first come forward with evidence that the government "implanted the criminal design" in his mind. Id. at 747. If the defendant shows this, the burden shifts to the government to

[4] Mr. Larive never suggests the jury instruction given at his trial was an incorrect statement of the law. The court finds that the district court's instruction was entirely accurate. Compare CR Docket No. 52 at 9, with Young, 613 F.3d at 746-48.

demonstrate beyond a reasonable doubt that the defendant was predisposed to commit the crime. Id.

Where the crime involves engaging in sex with a minor, some of the relevant factors in evaluating whether government inducement existed are: "whether the government made the initial contact, . . . whether the government introduced topics of sex and meeting in person; and the extent to which the government influenced [the defendant's] behavior by portraying [minors] as sexually precocious teenagers." Id. (quoting United States v. Myers, 575 F.3d 801, 806-07 (8th Cir. 2009)).

In the Young case, Young had made the first contact with undercover police who were posing as a minor girl. Id. at 747. It was also Young who initiated the majority of sexual discussions. Id. Young was the first to suggest a sexual encounter at a motel. Id. Pursuant to his own suggestion, it was Young who then reserved a room at that motel. Id. Although the undercover officer did allude to sex in some online chats, the court held Young was not entitled to an entrapment defense because there was no evidence the government implanted the criminal design in Young's mind. Id. Even if Young had showed inducement on the part of the government, the court held the government clearly showed Young was predisposed to commit the crime by introducing into evidence numerous other online chats Young had engaged in during which he attempted to arrange meetings with minors for sex. Id. at 748.

Here, Mr. Larive's counsel raised the issue of entrapment and succeeded in having the jury instructed on the defense. At that point, it was for the jury to determine whether there was entrapment. Young, 613 F.3d at 746. The jury decided against Mr. Larive by finding him guilty. Had counsel raised the entrapment issue on appeal, the only argument to be made was that there was insufficient evidence to sustain the jury's verdict.

There are sound reasons not to raise a sufficiency of the evidence claim on appeal. New, 652 F.3d at 953-54. Sufficiency of the evidence challenges face a high bar. Id. For such claims, the appellate court reviews the evidence *de novo*, viewing the evidence in the light most favorable to the jury's verdict. Id. The court will "reverse only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." Id. (citing United States v. Birdine, 515 F.3d 842, 844 (8th Cir. 2008)).

Here, as in the Young case, there was ample evidence to sustain the jury's verdict which rejected the entrapment defense. The undercover agents posted the ad online. It was then Mr. Larive who initiated contact with the undercover agents, not the other way around. Furthermore, the government was allowed to introduce evidence that just a couple of days earlier, Mr. Larive had made a similar attempt to arrange sex with a minor via the internet in exchange for a cell phone—the same barter he proposed to make in the case for which he was prosecuted. There is more than enough evidence for a reasonable jury to have found beyond a reasonable doubt that Mr. Larive was predisposed to arrange for commercial sex acts with minors.

A habeas petitioner must overcome the presumption that counsel's failure to raise a particular argument on appeal was not sound strategy. Roe, 160 F.3d at 418. The reality of effective appellate advocacy is that weaker issues must be screened out in order to focus attention on the strongest issues. Id. Therefore, even if an issue is "colorable" or "non-frivolous," counsel does not act deficiently by failing to raise every possible argument. Id. Where counsel provides an affidavit that the omitted issue was overlooked and not the result of trial strategy, and where other, less significant issues were raised on appeal, the presumption of sound trial strategy may be overcome. Id. at 419-20.

Here, Mr. Larive points to no facts suggesting that omitting the entrapment issue was not sound appellate strategy. There is no affidavit from counsel stating that the issue was overlooked. There were not a bevy of other weak issues that counsel *did* raise on appeal. Instead, the strongest issue in Mr. Larive's favor—the fact he drove away from the meeting place without actually meeting the person—was the only issue raised on appeal. This supports the powerful inference that it was sound trial strategy not to raise the sufficiency of the evidence issue as to entrapment.

The court finds counsel was not deficient in failing to raise the entrapment defense. It was a weak issue subject to a demanding standard of review on appeal. Furthermore, if the argument had been raised on appeal, it would have failed as there was more than enough evidence from which a reasonable jury could have found Mr. Larive was predisposed to commit this

crime beyond a reasonable doubt. New, 652 F.3d at 954 (failure to raise a weak argument on appeal is not ineffective assistance); Brown, 528 F.3d at 1032-33 (ineffective assistance not shown by failure to raise an argument on appeal that would not have been successful). The court recommends no relief be granted on this claim.

C. Insufficiency of the Indictment or Evidence

Mr. Larive argues the evidence was insufficient to support either the indictment or the jury verdict. Mr. Larvie asserts he was convicted of an "attempt" to commit a commercial sex act with a minor, but his indictment never charged him with an "attempt," only with a completed crime. See Civ. Docket No. 12. The indictment clearly charged Mr. Larive with an attempt as it stated "James Eugene Larive, Jr., did knowingly *attempt* to recruit, entice, and obtain a person who had not attained the age of 18 years, knowing and recklessly disregarding that the person was a minor and would be caused to engage in a commercial sex act. . ." See CR. Docket No. 1 at 1. This argument does not entitle Mr. Larive to relief.

As to the sufficiency of the evidence to support his conviction, the government argues Mr. Larive is precluded from raising this issue in his § 2255 motion because he already raised the issue on direct appeal. Having done so, the government argues, he may not relitigate it in collateral proceedings such as this one. See Docket No. 11 at 7 (citing United States v. Wiley, 245 F.3d 750, 752 (8th Cir. 2001)).

The government is right on both assertions. Mr. Larive litigated the issue of the sufficiency of the evidence to sustain his conviction on appeal. Larive, 794 F.3d at 1017. The Eighth Circuit rejected this argument. Id. at 1020. "With rare exceptions, § 2255 may not be used to relitigate matters decided on direct appeal." Sun Bear v. United States, 644 F.3d 700, 702 (8th Cir. 2011) (*en banc*) (citing Davis v. United States, 417 U.S. 333, 346-47 (1974)); Wiley, 245 F.3d at 752; United States v. McGee, 201 F.3d 1022, 1023 (8th Cir. 2000) (*per curiam*). Issues may be relitigated in a § 2255 motion if the error constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." Davis, 417 U.S. at 346-47; Sun Bear, 644 F.3d at 704. Exceptions may also be made where the petitioner presents convincing new evidence of actual innocence. Wiley, 245 F.3d at 752 (citing Weeks v. Bowersox, 119 F.3d 1342, 1350-51 (8th Cir. 1997) (*en banc*)).

Here, Mr. Larive never asserts there has been a fundamental defect resulting in a complete miscarriage of justice. This court has reviewed the sufficiency of the evidence as to the entrapment issue and found no error. The Eighth Circuit reviewed the sufficiency of the evidence as to the abandonment issue and found no error. Mr. Larive does not claim he has discovered new evidence or that he is actually innocent. The court concludes this case does not present that "rare exception" to the rule against relitigating issues in a § 2255 motion that were previously litigated on direct appeal. Accordingly, the court recommends no relief be granted on this issue.

D. District Court Should Have Granted Motion for Judgment of Acquittal

This issue is procedurally defaulted because Mr. Larive did not raise it on direct appeal. Frady, 456 U.S. at 167-68; McNeal, 249 F.3d at 749. As previously explained, when a § 2255 petitioner asserts a claim that is procedurally defaulted because it was not raised on direct appeal, the claim can only proceed after the petitioner has shown either: (1) actual innocence or (2) that the procedural default should be excused because there was both cause for the default and actual prejudice to the petitioner. Bousley, 523 U.S. at 621-22; McNeal, 249 F.3d at 749. Therefore, barring a claim of actual innocence, a petitioner must show both cause for why he failed to raise an issue on direct appeal as well as actual prejudice caused by the alleged errors.

Mr. Larive never asserts cause for failing to raise this issue on direct appeal. Nor does he assert a claim of actual innocence. As to prejudice, the court notes that motions for judgment of acquittal are governed by Federal Rule of Criminal Procedure 29. That rule provides in pertinent part: "the court on the defendant's motion must enter a judgement of acquittal of any offense for which the evidence is insufficient to sustain a conviction." See FED. R. CRIM. P. 29(a). The motion may be made at the close of the government's evidence, at the close of all the evidence, or within 14 days after the jury has returned a guilty verdict. See FED. R. CRIM. P. 29(a), (c).

The standard for granting a motion for judgment of acquittal is sufficiency of the evidence. See FED. R. CRIM. P. 29(a). This is the same standard which the Eighth Circuit applied to Mr. Larive's abandonment issue

on appeal, and the same standard this court applied in evaluating Mr. Larive's entrapment issue. Both courts, as well as the district court in ruling on the motion for judgment of acquittal at the time of trial, found sufficient evidence to support the jury's verdict. Therefore, even if Mr. Larive could establish cause to excuse his procedural default, the court concludes he cannot establish prejudice. Three courts have evaluated the evidence adduced by the government at Mr. Larive's trial and concluded there was sufficient evidence from which a reasonable jury could convict Mr. Larive. This court recommends no relief be granted on this ground of Mr. Larive's § 2255 motion.

E. Error in Sentencing

Mr. Larive asserts the district court erred in sentencing him to 120 months' imprisonment instead of 97 months' imprisonment at the bottom of his USSG sentencing range. This issue was not raised in Mr. Larive's direct appeal, so it is procedurally defaulted. Frady, 456 U.S. at 167-68; McNeal, 249 F.3d at 749. As such, he must assert cause and prejudice before this court may consider the claim, or make a convincing claim of actual innocence. Bousley, 523 U.S. at 621-22; McNeal, 249 F.3d at 749. He does not satisfy either of these burdens. The claim fails on its merits as well.

Although § 2255 motions can be used to address "critical errors" committed at sentencing, Kortness v. United States, 514 F.2d 167, 170 (8th Cir. 1975), the duration of a sentence may not be attacked in a § 2255 motion if the sentence was within statutory limits. United States v. Moore, 656 F.2d 378, 379 (8th Cir. 1981). See also Sun Bear, 644 F.3d at 704-05 (unless

movant can show he falls within the "miscarriage of justice" exception, ordinary questions of sentencing under the USSG do not present a cognizable § 2255 claim if the sentence was within statutory limits).

Here, the statutory penalty for the crime Mr. Larive was convicted of carried with it a mandatory minimum sentence of 120 months' imprisonment. See 18 U.S.C. § 1591(b)(2). The district court was without authority to impose a sentence below that mandatory minimum sentence. United States v. Freemont, 513 F.3d 884, 888 (8th Cir. 2008); USSG § 5G1.1(b) (if mandatory minimum sentence is higher than the maximum sentencing range under the USSG, court must apply the statutorily-required mandatory minimum sentence). Therefore, the district court's sentencing of Mr. Larive to the mandatory minimum sentence instead of the USSG range of 97 months' imprisonment was actually a result required by the law, not a "critical error." The court recommends no relief be granted on this claim.

F. Evidentiary Hearing

"While '[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,' no hearing is required 'where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based.' " New, 652 F.3d at 954 (quoting Anjulo-Lopez v. United States, 541 F.3d 814, 817 (8th Cir. 2008)). Here, the motion, files and records of the case, along with the applicable law, show that

Mr. Larive's § 2255 motion is not entitled to relief. Accordingly, this court recommends no evidentiary hearing be held.

CONCLUSION

Based on the foregoing facts, law and analysis, this magistrate judge respectfully recommends granting the government's motion to dismiss [Civ. Docket No. 9] and dismissing Mr. Larvie's motion to vacate, correct, or set aside his sentence [Civ. Docket No. 1] with prejudice.

NOTICE OF RIGHT TO APPEAL

The parties have fourteen (14) days after service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See 28 U.S.C. § 636(b)(1)(B). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Id. Objections must be timely and specific in order to require *de novo* review by the District Court. Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990); Nash v. Black, 781 F.2d 665 (8th Cir. 1986).

DATED February 10, 2017.

BY THE COURT:

Veronica L. Duffy

VERONICA L. DUFFY
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3701

James Eugene Larive, Jr.

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(5:16-cv-05078-JLV)

ORDER

The petition for rehearing by the panel is denied.

June 14, 2018

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

/s/ Michael E. Gans

Additional material from this filing is available in the Clerk's Office.