

# APPENDIX

## A

ORDERS BY THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 17-3374

Kenny Daniel Barrios

Appellant

v.

United States of America

Defendant

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Appeal from U.S. District Court for the Southern District of Iowa - Des Moines  
(4:17-cv-00182-JEG)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Murphy and Judge Kelly did not participate in the consideration or decision of this matter.

May 22, 2018

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

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/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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No: 17-3374

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Kenny Daniel Barrios

Petitioner - Appellant

v.

United States of America

~~Respondent - Defendant~~

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Appeal from U.S. District Court for the Southern District of Iowa - Des Moines  
(4:17-cv-00182-JEG)

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**JUDGMENT**

Before LOKEN, MURPHY and ERICKSON, 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.

March 29, 2018

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

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/s/ Michael E. Gans

# APPENDIX

## B

ORDER BY THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

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KENNY DANIEL BARRIOS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 4:17-cv-00182-JEG

**ORDER**

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Kenny Daniel Barrios filed this Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, pro se, challenging his conviction and sentence in *United States v. Barrios* 3:15-cr-00009-JEG-SBJ (S.D. Iowa) (“Crim. Case”).

A federal inmate may file a motion under § 2255 for release “upon 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, . . .” 28 U.S.C.

§ 2255(a). The “movant is entitled to an evidentiary hearing on a Section 2255 motion unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985) (citing 28 U.S.C.

§ 2255(b)); *see also Franco v. United States*, 762 F.3d 761, 763 (8th Cir. 2014) (“No hearing is required, however, where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based.”) (quoting *Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008)).

If it plainly and conclusively appears from the face of a § 2255 motion and the files and records of the case that the moving defendant is not entitled to any relief, the Court shall summarily dismiss the motion. *See* 28 U.S.C. § 2255; Rule 4(b) of the Rules Governing Section 2255 Proceedings in the United States District Courts. No evidentiary hearing is necessary here because even accepting the allegations as true, Barrios is not entitled to relief, and the motion must be summarily dismissed.

### **I. Factual and Procedural Background**

Barrios pleaded guilty to one count of receipt of child pornography. *Crim. Case, Plea Agreement 1*, ECF No. 41. The parties jointly recommended a prison sentence within the range of 108 to 168 months using a plea agreement pursuant to Fed. Rule Crim. P. 11(c)(1)(C). *Id.* at 6. Accepting the sentencing range of the parties, the Court sentenced Barrios to 168 months in prison. *See Crim. Case, Judgment 2*, ECF No. 60. Barrios appealed to the United States Court of Appeals but later moved to voluntarily dismiss the appeal. *Id.*, Court of Appeals Judgment, ECF No. 74.

Barrios now brings this pro se § 2255 motion, alleging multiple violations of his constitutional rights.

### **II. Discussion of Claims**

Barrios raises three claims in this § 2255 motion. Two of the claims are based on ineffective assistance of counsel and the other alleges court error during sentencing.

In general, “a valid, unconditional plea of guilty is an admission of guilt that waives all non-jurisdictional defects and defenses.” *United States v. Christenson*, 653 F.3d 697, 699 (8th Cir. 2011) (citing *United States v. Limley*, 510 F.3d 825, 827 (8th Cir. 2007)). A guilty plea taken may be challenged in a post conviction proceeding, but “the defendant’s representations during the plea-taking carry a strong presumption of verity and pose a formidable barrier in any subsequent collateral proceedings.” *Nguyen v. United States*, 114 F.3d 699, 703 (8th Cir. 1997) (internal quotation marks and citation omitted). A plea agreement cannot be knowing and voluntary when it is the result of ineffective assistance of counsel. *Deroo v. United States*, 223 F.3d 919, 923-24 (8th Cir. 2000).

To show counsel provided constitutionally ineffective assistance, a petitioner must show (1) counsel’s representation was deficient, and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish the first prong, a petitioner must show counsel’s performance fell below an objective standard of reasonableness. *Id.* at 687-88. Prejudice is demonstrated with “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. “In order to demonstrate prejudice where, as here, a petitioner challenges the validity of his guilty plea, the petitioner must show ‘that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’” *United States v. Frausto*, 754 F.3d 640, 643 (8th Cir. 2014) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Such probability “requires a ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” *Id.* (citing *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)).

**A. Ineffective Assistance of Trial Counsel**

Barrios claims trial counsel was constitutionally ineffective in two ways.

First, he asserts counsel failed to object to a finding that Barrios “distributed” pornography. Barrios pleaded guilty to receipt of child pornography not distribution. *See* Crim. Case, Judgment, ECF No. 60 (pleading guilty to 18 U.S.C. § 2252(a)(2)). Nonetheless, the Presentence Investigation Report (PSR) recommended the sentence be increased by two levels because Barrios had forwarded pornography to the victims. *See* Crim. Case, PSR at ¶ 61 (recommending increase under USSG § 2G2.1(b)(3) based on actions contained in ¶¶ 27, 29, and 31 of PSR). Barrios contends counsel should have argued “distribution” requires the actual transfer of possession of child pornography in a shared folder on a file sharing network.<sup>1</sup> *See* Motion 5, ECF No. 1.

In her objections to the PSR, defense counsel did advocate against the two-level enhancement for distribution because Barrios only “threatened” to post an image of the victim but never actually posted it. *See* Crim. Case, Objections to PSR 2 ¶ 7, ECF No. 52. At the sentencing proceeding, defense counsel withdrew her objection without further explanation on the record. *See* Crim. Case, Sent. Tr. 6, ECF No. 72 (counsel clarifying she was no longer “standing on the objection with regard to distribution”).

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<sup>1</sup> Pursuant to USSG § 2G2.1(b)(3), comment. (n.1), “distribution” includes “any act, **including possession with intent to distribute**, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor.” (emphasis added). Thus, while the objection was withdrawn given the very favorable Plea Agreement, the objection would not have been successful in any event.



Second, Barrios argues the images relevant to his conviction did not reveal the victim's face, and therefore there was no way to determine who the victims were or their age. He argues trial counsel wrongfully withdrew a standing objection to the lack of facial identity of the victims.

The Court does not agree counsel performed deficiently for failing to make these arguments. Nonetheless, even if trial counsel's representation was deficient in this respect, Barrios cannot demonstrate prejudice. Using the applicable Sentencing Guidelines relevant to his crime of conviction, the total offense level was 39. *Crim. Case*, PSR at 28 ¶ 139, ECF No. 56. His Criminal History was Category I. *Id.* This resulted in a Guideline imprisonment range of between 262 to 327 months. *Id.* The Guideline sentence was capped, however, by the statutory maximum of 20 years (240 months). *Id.* at ¶ 138 (applying 18 U.S.C. § 2252(b)(1)).

This statutory cap was further reduced by the 108 to 168 month imprisonment range negotiated by counsel Barrios under the 11(c)(1)(C) plea agreement. *Crim. Case*, Plea Agreement 6, ¶ 11, ECF No. 41. This was achieved even though the Sentencing Guideline range was "substantially higher than what has been agreed upon under the circumstances of this case." *Crim. Case*, Sent. Tr. 48-49, ECF No. 72. The Court noted that in this situation Barrios had already "made fairly significant progress" compared to the applicable Sentencing Guideline range. *Id.* at 8.

Ultimately, Barrios was not sentenced under the United States Sentencing Guidelines but pursuant to a substantially lower range negotiated by counsel in the 11(c)(1)(C) plea agreement. Successful arguments by counsel would have affected the Sentencing Guideline range, but further objections by counsel on these matters would not have affected the range already lowered

by the plea agreement. The Court relied on the range set out in the plea agreement, not the official Guideline range, to determine its sentence for Barrios. Thus, arguments by counsel, even if successful, would have had no effect on the Court's sentence.

Barrios has failed to show that the result of the sentencing proceeding would have been different if counsel had made these objections. *Strickland*, 466 U.S. at 694. For this reason, the claims of ineffective assistance of counsel are without merit and will be dismissed.

### **B. Due Process Violation**

Barrios argues the Court failed to make specific findings and failed to state reasons for imposing a particular sentence as required by 18 U.S.C. § 3553. He contends due process was violated further as he was given no opportunity to rebut any of the challenged information and present his own information.

In determining the particular sentence, a Court is required to consider many factors relevant to the conduct of a defendant and the circumstances of the crime. *See* 18 U.S.C. § 3553 (listing factors for courts to consider in imposing sentence). The Court fully addressed these factors at sentencing, stating, “[p]ursuant to the provisions of Title 18 United States Code Section 3553 in determining the sentence that’s appropriate, the Court considers the nature and circumstances of the offense and the history and characteristics of the Defendant. I have considered all of the factors under Section 3553(a), although it may not be necessary to address them all in explaining the sentencing today.” *Crim. Case, Sent. Tr. 46, ECF No. 72*. The Court acknowledged the Government’s statement regarding the nature and circumstances of the crime, but also took into account defense counsel’s description of Barrios’s characteristics and history.

*Id.* The Court considered the seriousness of the crime, the wide spread nature of child pornography, and the long term effects of the crime on the victims. *Id.* at 46-47. The Court noted Barrios did not have a history of criminal behavior apart from the instant crime. *Id.* at 48. It also considered sentences imposed on others in similar situations. *Id.* at 49. As demonstrated by this record, the Court fully considered all § 3553 factors.

With respect to the argument that Barrios did not have an opportunity to rebut information or present information in his defense, the argument also fails. Defense counsel fully addressed Barrios's situation, his attempts to rehabilitate himself, and his ability to take responsibility for his actions. *See id.* at 25-35. Moreover, Barrios himself addressed the Court, admitting his wrongdoing and asserting his desire to behave differently upon his discharge from prison. *Id.* at 35-41. As demonstrated by this record, Barrios, individually and through counsel, presented considerable information and argument to influence the Court to apply relevant § 3553 factors in his favor.

As demonstrated above, the Court did not fail to discuss § 3553 factors, nor did it preclude Barrios the opportunity to present information relevant to those factors. Barrios's argument that his due process rights were violated in these ways is without merit.

### **III. Conclusion and Summary**

The files and records of this case demonstrate Barrios is not entitled to any relief on his claims, and this case must be dismissed without a hearing. *See* 28 U.S.C. § 2255; *Franco*, 762 F.3d at 763. The Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 is denied, and the case is dismissed.

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States Courts, the Court must issue or deny a Certificate of Appealability when it enters a final order adverse to the movant. District courts have the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). A certificate of appealability 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). A substantial showing is a showing “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks and citations omitted). Barrios has not made a substantial showing of the denial of a constitutional right on his claims regarding application of the Sentencing Guidelines or counsel’s performance. Barrios may request issuance of a certificate of appealability by a judge with the United States Court of Appeals for the Eighth Circuit. *See* Fed. R. App. P. 22(b).

**IT IS SO ORDERED.**

Dated this 5th day of October, 2017.

  
JAMES E. GRITZNER, Senior Judge  
U.S. DISTRICT COURT

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