No. 18-3603

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



SEAN M. BARNHILL,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Sean M. Barnhill, a pro se federal prisoner, applies for a certificate of appealability (COA) in his appeal from a district court judgment denying his motion to vacate his sentence under 28 U.S.C. § 2255. *See* Fed. R. App. P. 22(b)(2). He also moves to proceed in forma pauperis on appeal.

Barnhill pleaded guilty, without a plea agreement, to one count of knowing receipt and distribution of a visual depiction involving the use of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(2). At sentencing, the district court applied multiple specific offense characteristics under USSG § 2G2.2 to increase Barnhill's base offense level of 22 to a total offense level of 37. After calculating the sentencing guidelines range as 151 to 188 months, the district court sentenced Barnhill to 180 months in prison. Barnhill appealed, arguing that his trial counsel was ineffective for not retaining a computer forensic analyst to challenge the evidence supporting the § 2G2.2 enhancements. However, this court affirmed and dismissed the appeal without prejudice, reasoning that Barnhill's claim should be presented in a § 2255 motion. *United States v. Barnhill*, No. 15-4229 (6th Cir. Oct. 31, 2016).

Barnhill then filed this § 2255 motion, arguing that: (1) the district court erred because the government provided an inadequate factual basis to sustain his guilty plea; (2) his trial counsel, Michael Puterbaugh, was ineffective for failing to (a) investigate the FBI's investigation

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into his case, (b) move to suppress the search warrant, (c) move to suppress his statements to investigators, and (d) investigate applicable laws and statutes before advising him to plead guilty; (3) Puterbaugh and his co-counsel, Anthony Koukoutas, were ineffective for failing to (a) obtain an expert to evaluate the evidence seized from his computer, (b) obtain a forensic expert to examine his hard drives, and (c) object to the offense level increase under § 2G2.2(b)(3)(F); (4) his appellate counsel was ineffective for failing to raise certain arguments on appeal and for not replying to the government's appellee brief; and (5) the district court erred in applying the § 2G2.2 enhancements. Barnhill later supplemented his motion, adding that: (6) his attorneys were ineffective for failing to (a) move to disqualify Special Assistant United States Attorney Benedict Gullo from his case, (b) move to disqualify the district court, (c) move to produce a statement by Gullo, (d) move for discovery and dismissal based on selective prosecution, and (e) object to his presentence report; (7) the district court erred by (a) applying the § 2G2.2 enhancements, (b) imposing a procedurally and substantively unreasonable sentence, and (c) allowing Gullo to testify at sentencing; (8) the district court lacked jurisdiction over his offense; and (9) his appellate counsel was ineffective for failing to raise these arguments on appeal.

The district court rejected Barnhill's claims on the merits, denied his motion, and declined to issue a COA.

A COA 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); *accord Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the denial of a motion is based on the merits, "[t]he petitioner must demonstrate 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). "[A] COA does not require a showing that the appeal will succeed," *Miller-El*, 537 U.S. at 337; it is sufficient for a petitioner to demonstrate that "the issues presented are adequate to deserve encouragement to proceed further," *Savoca v. United States*, 567 F.3d 802, 803 (6th Cir. 2009). Moreover, under § 2253(c), this court does not fully consider "the factual or legal bases adduced in support of the claims," rather this court conducts an "overview of the claims . . . and a general assessment of their merits." *Miller-El*, 537 U.S. at 336.

*Alleged District Court Error (Claims 1, 5, 7, 8)*

In Claim 1, Barnhill argues that the district court erred in accepting his plea because the government provided an inadequate factual basis to sustain his guilty plea.

Under Federal Rule of Criminal Procedure 11(b)(3), a district court "must determine that there is a factual basis for the [defendant's] plea." "The purpose of this requirement is to ensure the accuracy of the plea through some evidence that [the] defendant actually committed the offense." *United States v. Tunning*, 69 F.3d 107, 111 (6th Cir. 1995) (quoting *United States v. Keiswetter*, 860 F.2d 992, 995 (10th Cir. 1988)). In ensuring the factual basis for a plea, the district court can rely on the government's statements on the record, the defendant's statements, and witness statements with the defendant providing confirmation. *Id.* at 112. "So long as the district court ensures that the defendant's statement includes conduct—and mental state if necessary—that satisfy every element of the offense, there should be no question concerning the sufficiency of the factual basis for the guilty plea." *Id.*

In rejecting Barnhill's claim, the district court concluded that the plea proceedings demonstrated a factual basis for the plea and Barnhill's agreement with it. Reasonable jurists would not disagree.

At the plea hearing, the government stated that an FBI investigation revealed that Barnhill created an account on a website hosted outside the United States (referred to as Website A) and posted "images depicting visual depictions of real minors engaged in sexually-explicit conduct" that other users could comment on. Further, child pornography was found on various electronic devices owned by Barnhill. When asked by the district court if he believed that the government "could prove those facts beyond a reasonable doubt and [that] those facts support[ed] the elements of the charge against [him] beyond a reasonable doubt," Barnhill answered, "I do, your Honor." Because the government's factual basis tracked the elements of the offense and Barnhill admitted that the facts were true, this claim does not deserve encouragement to proceed further.

In Claims 5 and 7(a), Barnhill argues that the district court erred in applying offense level increases under § 2G2.2(b)(3)(F) (distribution of images), § 2G2.2(b)(4) (material portraying

sadistic or masochistic conduct), and § 2G2.2(b)(7) (offense involving 600 or more images). Generally, sentencing challenges cannot be raised for the first time in a § 2255 motion and are waived if not raised on direct appeal. *See Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001). However, sentencing challenges can be reviewed as part of an ineffective-assistance-of-counsel claim, which Barnhill raises, so this court will address Barnhill's sentencing claims. *See id.*

The district court rejected these claims, concluding that evidence supported each enhancement. Reasonable jurists would not disagree.

First, although Barnhill disputed the distribution enhancement at sentencing, arguing that his online photo albums containing child pornography were password protected and that there was no evidence that he shared the password with other users to give them access to the album, the government pointed out that Barnhill had admitted in a written statement to having "swapped child pornography with about 12 other internet users." Based on this admission, the district court did not err in applying the § 2G2.2(b)(3)(F) enhancement. Second, at least some of the images depicted adult male penetration of prepubescent girls, which supports the § 2G2.2(b)(4) enhancement. *See United States v. Groenendal*, 557 F.3d 419, 425-26 (6th Cir. 2009) (holding that sexual penetration of prepubescent children is inherently sadistic). And third, the FBI investigative reports revealed there were at least 1260 child pornography images, which supports the § 2G2.2(b)(7) enhancement. Although Barnhill argues that computer forensic evidence may show that he did not actually knowingly receive or distribute this many images, he has offered no such evidence. Accordingly, this claim does not deserve encouragement to proceed further.

In the remainder of Claim 7, Barnhill argues that the district court erred by imposing a procedurally and substantively unreasonable sentence and allowing Special Assistant United States Attorney Gullo to testify at sentencing.

In sub-claim (b), Barnhill asserts the district court failed to consider all of the 18 U.S.C. § 3553(a) sentencing factors and considered impermissible factors, such as his misconduct while in the Coast Guard. The district court rejected this argument, noting that it adequately considered the § 3553(a) factors and that Barnhill's misconduct in the Coast Guard was properly

factored into sentencing because Barnhill attempted to use his service as a tool to mitigate his sentence and it was only fair to consider his poor behavior as well. Reasonable jurists would not debate this conclusion.

Lastly, sub-claim (c) is based on a complete mischaracterization of the record. At sentencing, Gullo, who knew Barnhill through his service in the Coast Guard, provided the allocution and sentencing recommendation on behalf of the government in his capacity as a special assistant United States attorney. Reasonable jurists would not debate the district court's rejection of this sub-claim because Gullo did not testify against Barnhill.

In Claim 8, Barnhill argues that the district court lacked jurisdiction over his offense because he should have been prosecuted in a military court.

The district court rejected this claim, noting that there "is no requirement that a service member must be prosecuted in military courts instead of civilian courts." Reasonable jurists would not debate this conclusion. The district court had jurisdiction over Barnhill's criminal prosecution because his indictment charged him with violating federal law. *See* 18 U.S.C. § 3231 (providing that district courts "have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States"); *United States v. McCaskill*, 48 F. App'x 961, 961 (6th Cir. 2002) ("Federal courts have exclusive jurisdiction over offenses against the laws of the United States under 18 U.S.C. § 3231."); *see also United States v. Talbot*, 825 F.2d 991, 997 (6th Cir. 1987) ("[M]ilitary and civilian courts enjoy concurrent jurisdiction to prosecute armed forces personnel for criminal wrongdoing.").

*Ineffective Assistance of Counsel (Claims 2, 3, 4, 6, 9)*

In Claims 2, 3, 4, 6, and 9, Barnhill alleges that his trial and appellate counsel were ineffective. Ineffective-assistance claims are reviewed under the two-part test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a defendant to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *See Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) ("[I]neffective assistance of appellate counsel claims are governed by the same *Strickland* standard as claims of ineffective assistance of trial counsel.").

In Claim 2, Barnhill argues that trial counsel was ineffective for failing to (a) investigate the FBI's investigation into his case, (b) move to suppress the search warrant, (c) move to suppress his statements to investigators, and (d) investigate applicable laws and statutes before advising him to plead guilty.

In sub-claim (a), Barnhill summarily argues that had trial counsel properly investigated the FBI's investigation report, he would have discovered that it established no evidence of "actual or real child pornography" to support his conviction.

Defense counsel has a duty to investigate a client's case. *Strickland*, 466 U.S. at 690. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

The district court rejected this sub-claim, concluding that the record showed that trial counsel reviewed the images and evidently recognized them as real child pornography. Reasonable jurists would not debate this conclusion because trial counsel fulfilled his duty to investigate when he viewed the images in the FBI's file. Barnhill's unsupported allegations that the investigation was inadequate or that the images were not real children are insufficient to establish that trial counsel was ineffective. *See Wogenstahl v. Mitchell*, 668 F.3d 307, 343 (6th Cir. 2012) ("Merely conclusory allegations of ineffective assistance . . . are insufficient to state a constitutional claim.").

In sub-claim (b), Barnhill argues that trial counsel should have moved to suppress the search warrant for his residence, arguing that it was based on false statements and lacked probable cause.

The FBI began investigating Website A for possible exchanging of child pornography. Website A voluntarily provided user data to a foreign law enforcement agency, which in turn provided the information to the FBI. Using this data, the FBI uncovered that Barnhill was a Website A user, who had been posting child pornography. From these facts, Barnhill argues that

the FBI needed a warrant to obtain his user information and that the agent who prepared the warrant lied about the source of the user data.

The district court rejected this sub-claim as lacking a factual or legal basis. Reasonable jurists would not disagree. First, Barnhill cites no legal authority requiring a search warrant for evidence obtained by foreign investigators outside the United States. *See United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994) ("Evidence obtained by foreign police officials from searches conducted in their country is generally admissible in federal court regardless of whether the search complied with the Fourth Amendment."). Second, he points to no lie by the FBI agent, and the warrant application correctly lays out how the FBI obtained Barnhill's user data.

In sub-claim (c), Barnhill argues that trial counsel should have moved to suppress his custodial statements to investigators.

Under *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the prosecution may not use a defendant's statements stemming from custodial interrogation unless the defendant is given certain warnings—"that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." In determining whether an interrogation is custodial, this court considers "(1) the location of the interview; (2) the length and manner of the questioning; (3) whether there was any restraint on the individual's freedom of movement; and (4) whether the individual was told that he or she did not need to answer the questions." *United States v. Hinojosa*, 606 F.3d 875, 883 (6th Cir. 2010).

The district court rejected this claim, concluding that Barnhill was not under custodial interrogation and waived his *Miranda* rights. Reasonable jurists would not disagree. Although Barnhill summarily asserts that FBI agents coerced him into producing involuntary statements, the record shows otherwise. Barnhill gave multiple statements to investigators. The first occurred at his residence when FBI agents executed the search warrant. The agents advised him that he was not in custody, that he was not under arrest, and that they could offer no legal advice or predictions about the outcome of his case. Barnhill told the agents that he did not intentionally look at child pornography but came across it inadvertently. Thereafter, Barnhill

drove himself to an FBI office, where he executed a *Miranda* waiver form, agreed to take a polygraph exam, and made a written statement, in which he admitted that he intentionally sought out and viewed child pornography. Given these circumstances, this sub-claim does not deserve encouragement to proceed further.

In sub-claim (d), Barnhill argues that had trial counsel investigated relevant statutes, he would have discovered that the images he possessed were of Barnhill's wife, not an actual child, and thus his plea was ill-advised. Also, he argues that the government needed to prove that the images are real minors.

The district court reasoned that Barnhill's own admissions undercut this sub-claim. Reasonable jurists would not disagree. Although Barnhill now submits that the photos he possessed were not child pornography, he admitted otherwise at his plea hearing when he agreed with the government that the images depicted "real minors engaged in sexually-explicit conduct." These "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). Barnhill's self-serving statements now do not overcome his earlier admissions.

In Claim 3, Barnhill argues that his attorneys were ineffective for failing to (a) obtain an expert to evaluate the evidence seized from his computer, (b) obtain a forensic expert to examine his hard drives, and (c) object to the offense level increase under § 2G2.2(b)(3)(F).

In sub-claims (a) and (b), Barnhill asserts that if his attorneys had obtained a computer expert, they might have uncovered defenses to the various enhancements that he received at sentencing. The district court rejected these arguments, reasoning that counsel considered but ultimately concluded that it was unnecessary to hire a computer expert. Because Barnhill's speculative arguments that a computer investigator may have been able to help him do not warrant a finding that his counsel was ineffective, reasonable jurists would not disagree.

In sub-claim (c), Barnhill argues that his attorneys were ineffective for failing to object to the enhancement under § 2G2.2(b)(3)(F) for distribution. However, as noted above, there was evidence of distribution, including Barnhill's statement that he "swapped child pornography with about 12 other internet users."

In Claim 6, Barnhill argues that trial counsel was ineffective for failing to (a) move to disqualify Special Assistant United States Attorney Gullo from his case, (b) move to disqualify the district court, (c) move to produce a statement by Gullo, (d) move for discovery and dismissal based on selective prosecution, and (e) object to his presentence report.

Sub-claims (a)-(d) are essentially reformulations of Barnhill's above-rejected claims. In sub-claims (a) and (c), Barnhill asserts that Gullo was biased against him and that, because Gullo allegedly testified at his sentencing hearing, his counsel should have moved to produce Gullo's statement. The district court rejected both arguments, concluding that Gullo exhibited no bias and did not act as a witness at the sentencing hearing. Reasonable jurists would not debate either conclusion.

Sub-claims (b) and (d) allege that the district court was biased against Barnhill because of his misconduct in the Coast Guard, that he was prosecuted more harshly because of his service, and that his case belonged in military court. As already noted, these claims fail because the district court's remarks at sentencing regarding Barnhill's Coast Guard service were directed at Barnhill's attempt to mitigate his sentence with his service record and the district court had jurisdiction over Barnhill's criminal prosecution.

In sub-claim (e), Barnhill contends that his counsel should have objected to two portions of his presentence report: a reference to his relationship with a teen girl named Jessica and an allegedly undisclosed psychological report, in which he was diagnosed with pedophilia exclusive type. Because Barnhill has failed to explain how he was prejudiced by the inclusion of these items in his presentence report, this claim does not deserve encouragement to proceed further.

In Claims 4 and 9, Barnhill argues that his appellate counsel was ineffective for failing to raise his arguments on appeal and for not replying to the government's appellee brief. Reasonable jurists would not debate the district court's rejection of these claims because appellate counsel cannot be ineffective for failing to raise meritless claims. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013). Further, Barnhill has not demonstrated that he was prejudiced by counsel's failure to file a reply brief.

*Failure to Hold Evidentiary Hearing*

Lastly, Barnhill argues that the district court should have held an evidentiary hearing to allow him to develop his claims, although he does not specify the evidence that he hoped to elicit. An evidentiary hearing is not necessary when the record "conclusively shows that the petitioner is entitled to no relief." *See Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007) (quoting *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999)). Because the record showed that Barnhill's grounds for relief lacked merit, an evidentiary hearing was not necessary in this case.

Accordingly, this court **DENIES** Barnhill's COA application and **DENIES** as moot his motion to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| SEAN BARNHILL, | ) | CASE NO.1:15CR0048 |
| | ) | 1:17CV2294 |
| Petitioner, | ) | JUDGE CHRISTOPHER A. BOYKO |
| Vs. | ) | |
| UNITED STATES OF AMERICA, | ) | OPINION AND ORDER |
| Respondent. | ) | |

CHRISTOPHER A. BOYKO, J:

This matter is before the Court on Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. §2255 (ECF #40) and Motion for Leave to Supplement the Record (ECF#43). The Government filed a Response in Opposition to Petitioner's Motion (ECF#46). For the following reasons, the Court denies Petitioner's Petition.

## FACTS

On February 3, 2015, a federal grand jury in the Northern District of Ohio indicted Petitioner with Receiving and Distributing Visual Depictions of Real Minors Engaged in



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Sexually Explicit Conduct and Access with Intent to View Child Pornography. On July 13, 2015, Petitioner pleaded guilty to Count One, Receiving and Distributing Visual Depictions of Real Minors Engaged in Sexually Explicit Conduct without a plea agreement. On October 30, 2015, the Court sentenced Petitioner to a Guidelines sentence of 180 months' imprisonment, a life term of Supervised Release that included compliance with the Sex Offender Registration and Notification Act, and a $100 Special Assessment.

Petitioner filed a Notice of Appeal on November 5, 2015. The Sixth Circuit Court of Appeals affirmed the district court's Judgment and dismissed the Appeal without prejudice to allow Petitioner to present his ineffective assistance claim in a Motion to Vacate his sentence pursuant to 28 U.S.C. § 2255. On July 6, 2017, Petitioner filed his first Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody asserting five grounds for relief: District Court Error and Ineffective Assistance of Counsel. On November 22, 2017, Petitioner filed a Motion for Leave and Additional Claims for Relief, asserting four additional grounds for relief: Ineffective Assistance of Counsel, District Court Error and Jurisdiction. On January 29, 2018, Respondent filed its Response in Opposition. On March 12, 2018 Petitioner filed his Response to Opposition to the Government's Opposition.

## STANDARD OF REVIEW

Section 2255 of Title 28, United States Code, provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

In order to prevail upon a §2255 motion, the movant must allege as a basis for relief: '(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid. '" *Mallett v. United States,* 334 F.3d 496-497 (6th Cir. 2003), quoting *Weinberger v. United States,* 268 F.3d 346, 351 (6th Cir.2001).

**ANALYSIS**

In Grounds Two, Three, Four, Six and Nine Petitioner contends that he was denied effective assistance of counsel. To make an ineffective assistance of counsel claim, the petitioner must demonstrate both inadequate performance by counsel and prejudice resulting from that inadequate performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* at 686. Indeed, under the test set forth in *Strickland,* the defendant must establish deficient performance and prejudice:

> 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 ... resulted from a breakdown in the adversary process that renders the result unreliable.

*Id.* at 687.

In Ground Two, Petitioner alleges that counsel failed to investigate and failed to suppress evidence. In Ground Three, Petitioner alleges that counsel failed to obtain an expert and failed to object to sentencing guidelines. In Ground Four, Petitioner alleges that appellate counsel failed to challenge the factual basis, the affidavit, warrant and Petitioner's statements. In Ground Six, Petitioner alleges that counsel failed to file motions that Petitioner wanted filed. In Ground Nine, Petitioner alleges appellate counsel should have raised additional issues.

Respondent's Opposition clearly and thoroughly outlines the steps taken by counsel in preparing Petitioner's defense. Counsel did what the law requires by looking at the images; counsel correctly concluded that there was no basis for suppression motions for either the search warrant or the statements; counsel considered and ultimately rejected hiring a forensic expert in light of the facts of the case; and counsel presented his objections to the Presentence Report in a letter to the Probation Officer. At sentencing counsel argued his objections to a sentencing enhancement, but then withdrew his objections and acknowledged that the enhancement was appropriate.

At the plea colloquy the Court determined that Petitioner understood the elements of the offense. Petitioner stated that he agreed to the facts that make up the elements of the offense. Petitioner stated that he was satisfied with his counsel and understood everything that had transpired in his case. "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). The Court was satisfied that Petitioner understood everything that was happening in his case.

Petitioner fails to show how counsel's performance was deficient in any way. Petitioner fails to point to any error by counsel at any point during the proceedings or on appeal. Petitioner's allegations of ineffectiveness are not supported by case law, directly contradict the facts, are misleading at the least and untrue. Petitioner was interviewed in his own home, was not under arrest as he claimed, drove himself to the FBI office, was not in custody, waived his rights and agreed to take a polygraph examination.

To prevail on a claim of ineffective assistance of counsel, Petitioner must show that counsel's performance resulted in prejudice to him, i.e. the district court applied enhancements that were incorrect and likely resulted in a higher sentence. *Strickland*, 466 U.S at 694. While Petitioner claims that counsel should have filed a motion to disqualify the Special Assistant United States Attorney assigned to his case, he fails to present any evidence to support a motion. Petitioner was previously acquainted with the SAUSA from his service in the coast Guard. The Court agrees with Respondent that the SAUSA's interest in the outcome of this case was professional, not personal, and Petitioner cannot show how the outcome of his case would have been different with a different prosecutor.

The same standard that governs a Sixth Amendment claim for ineffective assistance of counsel at trial under *Strickland* applies to determine the adequacy of counsel on direct appeal. *Mapes v. Tate*, 388 F.3d 187, 191 (6th Cir. 2004)(citing *Strickland*, 466 U.S. at 687). Respondent points out that in *Wilson v. Parker*, 515 F.3d 682, 706-07 (6th Cir. 2008), the Sixth Circuit succinctly summarized the analysis that the federal courts use to analyze a claim of ineffective assistance of

appellate counsel. To quote *Wilson*:

> To evaluate a claim of ineffective assistance of appellate counsel, we assess the strength of the claim appellate counsel failed to raise. 'Counsel's failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.' *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004). 'If there is a reasonable probability that [the defendant] would have prevailed on appeal had the claim been raised, we can then consider whether the claim's merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel.' *Id.* at 700.

*Wilson*, 513 F.3d at 707.

Appellate counsel argued ineffective assistance in the appeal. Petitioner now contends that appellate counsel should have argued additional issues that have now been shown to be without merit. Not every non-frivolous issue must be raised by counsel on direct appeal in order to avoid a claim of ineffective assistance. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002). It is clear to the Court that counsel's strategy to raise this issue on appeal shows that counsel considered it to be the most beneficial to Petitioner. The presumption that counsel has rendered effective assistance on appeal will be overcome only if the ignored issue was clearly stronger than the issues presented. *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Petitioner cannot overcome this presumption.

Before a hearing on a Section 2255 petition must be held, "the petition must be accompanied by a detailed and specific affidavit which shows that the petitioner has actual proof of the allegations going beyond mere unsupported assertions." *Barry v. United States*, 528 F.2d 1094, 1101 (7th Cir. 1976). Petitioner has not shown that he

was provided ineffective assistance at any stage in his case. Petitioner has offered no proof beyond mere allegations that his counsel's performance was deficient. Therefore, Grounds Two, Three, Four, Six and Nine are denied as without merit.

Petitioner also alleges that in Ground One the Court erred during the plea colloquy, in Grounds Five and Seven the Court erred at sentencing and in Ground Eight the Court should not have allowed Petitioner's military history to be presented at sentencing.

As outlined above, the Court thoroughly questioned Petitioner during the plea colloquy. Petitioner stated that he understood everything that had happened in his case, he understood the charges and agreed with the facts as presented. The Court agrees with Respondent that Petitioner faces a heavy burden in collaterally attacking a guilty plea based on allegations contrary to oral responses given in open court during a Rule 11 colloquy. *Warner v. United States*, 975 F.2d 1207, 1212 (6th Cir. 1992); see also *Blackledge,* 431 U.S. at 73-74, ("[T]he representations of the defendant, his lawyer, and the prosecutor at [a plea or sentencing] hearing, as well as any findings made by the judge in accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings."); *Ramos v. Rogers*, 170 F.3d 560, 566 (6th Cir. 1999) (explaining that failing to hold defendants to their statements would "render the plea colloquy process meaningless" and "condon[e] the practice by defendants of providing untruthful responses to questions during plea colloquies").

Petitioner cannot show that any error occurred during the plea proceedings. Ground One is denied.

In Ground Five, Petitioner alleges that the Court should not have applied

sentencing enhancements without evidence established on the record. Respondent argues that the enhancement under USSG § 2G2.2 (b)(4) for sadistic or masochistic images does not require that Petitioner have affirmatively sought out such material. The application notes make clear that the enhancement applies "regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute such materials." USSG § 2G2.2, comment.

The Court agrees. Such images are unquestionably sadistic and warrant the enhancement. *United States v. Groenendal*, 557 F.3d 419, 425-26 (6th Cir. 2009) (collecting cases where images depicting the penetration of prepubescent female were deemed sadistic); *United States v. Parker*, 267 F.3d 839, 847 (8th Cir. 2001) (depiction of adult males urinating on minor female was sadistic). Petitioner had numerous images such as this on multiple devices. As stated above, at sentencing counsel objected to the enhancements but then withdrew the objection after conferring with Petitioner. Petitioner fails to provide any information to persuade the Court that the enhancements were applied in error. Ground Five is denied.

In Ground Seven, Petitioner alleges the Court erred at sentencing by imposing an unreasonable sentence. Respondent correctly points out that a sentence within the United States Sentencing Guidelines has a presumption of reasonableness. The advisory range for Petitioner was 151-188 months. Petitioner was sentenced to 180 months.

The federal courts of appeals review federal sentences and set aside those they find "unreasonable." *See e.g., United States v. Booker*, 543 U.S. 220, 261-263 (2005). "Several Circuits have held that, when doing so, they will presume that a sentence

imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence." *Rita v. United States,* 551 U.S. 338, 341 (2007). The Supreme Court in *Rita* upheld the findings of the Circuit Courts. *Id.* In this case, the Court imposed a sentence that reflected the seriousness of the crime, in spite of counsel's attempt to mitigate Petitioner's behavior. Ground Seven is denied as meritless.

In Ground Eight, Petitioner alleges that the Court lacked jurisdiction to allow Petitioner's military history to be presented in a civilian court. When the FBI executed a search warrant at Petitioner's home, he answered the door and announced himself as a Lieutenant with the U.S. Coast Guard. At sentencing Petitioner stated that he had many years of honorable, selfless service, sacrifice to our nation and had been recognized for positive actions throughout his service. Clearly, Petitioner hoped to mitigate his possible sentence by bringing his military history to the attention of the Court. Respondent however, pointed out that Petitioner's position of public trust as a military officer is an aggravating factor for his offense.

There is no requirement that a service member must be prosecuted in military courts instead of civilian courts.

> It is well established that, under proper circumstances, as here, military and civilian courts enjoy concurrent jurisdiction to prosecute armed forces personnel for criminal wrongdoing, inasmuch as the military justice system was designed to supplement rather than displace the civilian penal system, and such concurrent jurisdiction affords the pertinent authorities a choice of forum in which to prosecute the offender, an election generally resolved by considerations of comity and relevant military and civilian interests.

*United States v. Talbot*, 825 F.2d 991, 997 (6th Cir. 1987). Petitioner fails to provide any factual basis to support this claim. Ground Eight is denied.

Petitioner has not demonstrated that his counsel's representation was objectively unreasonable. This Court finds Petitioner has not met his burden under *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner has put forth claims that are untrue and has consistently tried to mislead the Court about the facts in this case. Therefore, for the foregoing reasons Petitioner's Motion to Vacate is denied.

Furthermore, the Court declines to issue a certificate of appealability.

28 U.S.C. §2253(c) states:

**(c)(1)** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

**(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

**(B)** the final order in a proceeding under section 2255.

**(2)** A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

**(3)** The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

In *Slack v. McDaniel*, 529 U.S. 473, 483-4 (2000) the Supreme Court held,

> To obtain a COA under 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot,* includes 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.' " (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n. 4 (1983) superceded by statute.

Since the Court has determined Petitioner's claims in his Motion to Vacate are meritless, Petitioner has failed to make a substantial showing that he was denied any constitutional right. Therefore, the Court will not issue a certificate of appealability.

IT IS SO ORDERED.

June 4, 2018
Date

s/Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

No. 18-3603

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Feb 12, 2019
DEBORAH S. HUNT, Clerk

SEAN M. BARNHILL,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: COLE, Chief Judge; SILER and CLAY, Circuit Judges.

Sean M. Barnhill, a pro se federal prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C

No. 18-3603

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Feb 28, 2019
DEBORAH S. HUNT, Clerk

SEAN M. BARNHILL,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: COLE, Chief Judge; SILER and CLAY, Circuit Judges.

Sean M. Barnhill petitions for rehearing en banc of this court's order entered on January, 14, 2019, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX D

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