

ADDENDUM

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1388

John T. Beyers

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:18-cv-00061-BP)

JUDGMENT

Before SHEPHERD, WOLLMAN, and STRAS, Circuit Judges.

The district court's denial of the recusal motion is affirmed. Appellant's application for a certificate of appealability is denied.

May 08, 2019

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

/s/ Michael E. Gans

APPENDIX B

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

No: 19-1388

John T. Beyers

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:18-cv-00061-BP)

ORDER

The petition for rehearing is denied.

June 14, 2019

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

/s/ Michael E. Gans

APPENDIX C

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

ORDER

Movant John T. Beyers pleaded guilty to a three-count indictment for charges involving child pornography and obscenity. Now before the Court are Movant's *pro se* motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Doc. 1) and Motion for Recusal (Doc. 25). For the reasons explained below, Movant's motions are denied. Furthermore, a certificate of appealability is denied and this case is dismissed.

I. Motion for Recusal (Doc. 25).

On October 9, 2018, Movant file his motion requesting that the undersigned recuse from this case. Doc. 25. Movant alleges impartiality due to the rulings in this case concerning Movant’s motion to amend his § 2255 motion and an alleged “bias in favor of the prosecution” due to the undersigned’s prior employment. *Id.* at p. 2.

“Section 455(a) of Title 28 of the United States Code requires a federal judge to ‘disqualify himself in any proceeding in which his impartiality might reasonably be questioned.’” *Liteky v. United States*, 510 U.S. 540, 541 (1994). However, it is well established that “judicial rulings alone almost never constitute valid basis for a bias or partiality recusal motion.” *Id.* at 554 (internal citations omitted). Valid proof of judicial bias must be from an extrajudicial “source outside the

III. Legal Standard

Title 28 U.S.C. § 2255 provides that an individual in federal custody may file a motion to vacate, set aside, or correct his or her sentence. A motion under this statute “is not a substitute for a direct appeal and is not the proper way to complain about simple trial errors.” *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994) (internal citations omitted). Instead, § 2255 provides a statutory avenue through which to address constitutional or jurisdictional errors and errors of law that “constitute[] a fundamental defect which inherently results in a complete miscarriage of justice.” *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

A § 2255 motion “can be dismissed without a hearing if (1) the petitioner’s allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.” *Sanders v. United States*, 341 F.3d 720, 722 (8th Cir. 2003) (citation omitted). Additionally, a petition that consists only of “conclusory allegations unsupported by specifics [or] contentions that, in the face of the record, are wholly incredible,” is insufficient to overcome the barrier to an evidentiary hearing on a § 2255 motion. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

IV. Analysis

Movant brings five grounds for relief: (1) counsel failed to raise relevant factors by showing Movant “repeatedly asked for more therapy and his probation officer ignored him”; (2) the search and seizure was illegal because “[t]here was no reasonable suspicion for a search”;

(3) “supervised release is double jeopardy”; (4) “Beyers should be resentenced in light of Dean”²; and (5) “[t]herapy is an unconstitutional deprivation of liberty.” Doc. 1.

A. Ground One is without merit

In Ground One, Movant asserts that counsel was ineffective for failing to argue at sentencing that his probation officer did not provide the mental care statutorily required pursuant to 18 U.S.C. § 3563(b)(9), and for failing to offer case law that would have explained the relevance of his request for care. Doc. 2, p. 5. Movant argues that his desire for additional mental treatment beyond that which was provided, and his inability to obtain it through his probation officer, was a mitigating factor that would have resulted in a concurrent sentence, as opposed to a consecutive sentence. *Id.*

While a claim of ineffective assistance of counsel may be sufficient to attack a sentence under § 2255, the “movant faces a heavy burden.” *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996). To establish that counsel was ineffective, a movant must “show that his ‘trial counsel’s performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense.’” *Nave v. Delo*, 62 F.3d 1024, 1035 (8th Cir. 1995) (quoting *Lawrence v. Armontrout*, 961 F.2d 113, 115 (8th Cir. 1992)); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under this framework, there is a “strong presumption that counsel’s conduct falls within the wide range of professionally reasonable assistance and sound trial strategy.” *Garrett v. United States*, 78 F.3d 1296, 1301 (8th Cir. 1996) (citation omitted).

Both prongs of the *Strickland* framework must be established in order to be entitled to § 2255 relief; a failure to establish either prong is fatal to a claim of ineffective assistance of counsel. *See Strickland*, 466 U.S. 697; *DeRoo v. United States*, 223 F.3d 919, 925 (8th Cir. 2000)

² *Dean v. United States*, 581 U.S. ___, 127 S. Ct. 1170 (April 3, 2017).

“[i]f the defendant cannot prove prejudice, we need not address whether counsel’s performance was deficient”). To establish *Strickland*’s prejudice prong in a guilty-plea context, “a defendant must establish a reasonable probability that he would have exercised his right to a trial but for counsel’s ineffectiveness.” *Watson v. United States*, 682 F.3d 740, 745 (8th Cir. 2012); *see Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985).

Here, as correctly argued by Respondent, the statute upon which Movant relies, 18 U.S.C. § 3563, outlines mandatory conditions a court “shall” impose and discretionary conditions of probation that a court “may” impose as conditions of supervised release. Section 3563(b)(9) is a discretionary condition which specifically states that “the court may provide, as further conditions of a sentence of probation, . . . that the defendant . . . (9) undergo *available* medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose.” (emphasis added). When §3563(b)(9) is utilized by the court as a condition of supervised release, the only obligation imposed is on the defendant, not the probation officer.

Even if counsel had argued that the probation officer violated a statutory duty to provide required care, such a claim would have been meritless. Counsel is not ineffective for failing to raise such a claim. *Rodriguez v. United States*, 17 F.3d 225, 226 (8th Cir. 1994) (“Failure to make a meritless argument does not rise to the level of ineffective assistance.”). Further, Movant has failed to demonstrate that counsel’s failure to raise such an argument resulted in prejudice. Upon review of the record, the Court notes that Movant’s mental care was discussed during the sentencing hearing. Specifically, the record demonstrates counsel presented testimony of therapist Lara Mars, and read into the record a letter from Movant’s step-father concerning the requests for

counseling while in custody in an effort to argue for a concurrent sentence. Crim. Doc. 51, p. 19, 25, 31-32.

Accordingly, because Movant has failed to establish that counsel provided deficient performance and that he was prejudiced by this representation, Ground One is denied.

B. Ground Two is without merit

Next, Movant claims counsel was ineffective as follows:

Counsel challenged the search as illegal, and lost based on Beyers' 'diminished expectation of privacy' while on supervised release, and comparing his status to that of someone on parole. Counsel should have challenged this comparison and highlighted the differences. As this was the central point of Beyers' denial, the failure to be prepared for and ready to dispute this point was ineffective.

Doc. 2, p. 8.

As previously explained, to establish that counsel was ineffective, a movant must "show that his 'trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense.'" *Nave*, 62 F.3d at 1035.

Here, Movant contends counsel failed in his representation of Movant by failing to challenge the comparison and highlight the differences inherent in Movant's status as a probationer rather than a parolee. Doc. 2, p. 8. Specifically, Movant cites the Court's reliance on *Samson v. California*, 547 U.S. 843, 850-51 (2006), which (as Movant correctly notes) held that "parolees have a [] diminished expectation of privacy because they are still serving a prison sentence." Doc. 2, p. 8.

In denying Movant's motion to suppress, it is true that the Court recognized the *Samson* ruling and applied its reasoning to Movant's case, notwithstanding Movant's status as a probationer rather than parolee. *See* Crim. Doc. 24, pp. 6-7. Importantly, however, the Court did

take care to recognize the inherent differences between a status as “parolee” and that of a “probationer.” Accordingly, the Court relied on *Samson* only as providing analogous reasoning to *United States v. Knights*, 534 U.S. 112, 119 (2001). Crim. Doc. 24, pp. 6-7. Plainly, the Court relied on the reasoning within both *Samson* (holding the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee), *id.* at 7 (quotation omitted), and *Knights* (upholding warrantless search conducted pursuant to terms of probation), *id.* at 6, to establish that to rule on the motion to suppress, the Court must determine whether the suspicionless search here regarding Movant (as a probationer) was reasonable under the totality of the circumstances. *Id.* at 7.

In making this determination, the Court denied Movant’s motion to suppress and expressly relied on *Knights* for the basic proposition that Movant, on probation, has a “diminished expectation of privacy” (1) because of his status as a probationer,³ and (2) under the search conditions clearly expressed in the probation order. *See* Crim. Doc. 24, pp. 7-8. This is directly contrary to Movant’s assertion that the Court relied on *Samson* (dealing exclusively with a parolee rather than a probationer) to establish Movant’s reduced expectation of privacy. *See, e.g.*, Doc. 2, p. 8.

Accordingly, the record demonstrates that Movant’s claim of ineffective assistance of counsel is without merit. Counsel is not ineffective for failing to raise a meritless argument. *Rodriguez*, 17 F.3d at 226. In denying Movant’s motion to suppress, the Court found Movant,

³ Specifically, the Court recognized that: “Beyers’ status as a probationer means that he begins with a lower expectation of privacy than is enjoyed by a citizen who is not subject to a criminal sanction.

Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty. . . . Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled.

Crim. Doc. 24, p. 7 (quoting *Knights*, 534 U.S. at 119).

under the probation order, had a reduced expectation of privacy that permitted a warrantless and suspicionless search under the Fourth Amendment. The Court recognized that Movant did, as a probationer, have a greater expectation of privacy when compared to a parolee. *See* Crim. Doc. 24, pp. 8-9. But nevertheless, the Court held that under *Knights*, any intrusion of Movant's still-lowered expectation of privacy as a probationer (as compared to a non-probationer and non-parolee) did not violate the Fourth Amendment under either the totality of the circumstances or in light of the "accepted and acknowledged terms" of Movant's probation order. *Id.*

Alternatively, based on the consideration of the record and the Court's order, Movant has failed to meet his burden to show that counsel was constitutionally ineffective for failing to articulate and argue for a parolee-probationer distinction, and that the deficient representation prejudiced Movant in any way. This is especially apparent because the record shows the Court relied on *Knights* to establish Movant's lowered expectation of privacy and additionally, the Court expressly adopted the Ninth Circuit's reasoning in *United States v. King*, 736 F.3d 805, 809 (9th Cir. 2013)—recognizing that although probationers have a greater expectation of privacy than a parolee (per *Samson*) a probationer's expectation of privacy is nonetheless reduced. *See* Crim. Doc. 24, p. 8. Ground Two is denied.

C. Grounds Three and Five are procedurally barred

In Ground Three, Movant contends that supervised release is a second sentence and prohibited by the Double Jeopardy Clause. Ground Five of Movant's motion alleges that therapy deprives him of more liberty than necessary under § 3553(a). However, as argued by Respondent, Movant failed to raise either of these issues on direct appeal.

If a claim could have been raised on direct appeal but was not, it cannot be raised in a § 2255 motion unless the movant can show both (1) "cause" that excuses the default, and (2)

“actual prejudice” resulting from the errors of which he complains. *See Massaro v. United States*, 538 U.S. 500, 504 (2003); *United States v. Frady*, 456 U.S. 152, 168 (1982); *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997). If a movant is unable to show “cause” and “actual prejudice,” he must make a “substantial claim that constitutional error has caused the conviction of an innocent person ...” *Schlup v. Delo*, 513 U.S. 298, 321 (1995). A claim of actual innocence must be based on “new evidence,” and must convince the Court that “it is more likely than not that no reasonable juror would have found [movant] guilty beyond a reasonable doubt.” *Id.* at 327; *see also Embrey v. Hershberger*, 131 F.3d 739, 741 (8th Cir. 1997) (applying *Schlup* actual innocence standard in the context of a § 2255 motion).

“Cause” under the cause and prejudice test “must be something external to the [movant], something that cannot fairly be attributed to him,” for example, a showing that the factual or legal basis for a claim was not reasonably available, or that some interference by officials made compliance with the procedural rule impracticable. *Stanley v. Lockhart*, 941 F.2d 707, 709 (8th Cir. 1991) (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)); *see also Greer v. Minnesota*, 493 F.3d 952, 957–58 (8th Cir. 2007). To establish “actual prejudice,” a petitioner must demonstrate that the claimed errors “worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *Frady*, 456 U.S. at 170.

Here, based on the facts and the record in this case, Movant does not claim actual innocence, and is unable to establish either prong of the cause and prejudice standard.

Regardless, a single sentence is divided between incarceration and supervised release under 18 U.S.C. § 3583(a). *See Johnson v. United States*, 529 U.S. 694, 700 (2000) (supervised release and additional period of incarceration is part of the punishment for the original offense); *Ohio v. Johnson*, 467 U.S. 493, 499 (1984) (citing *Missouri v. Hunter*, 459 U.S. 359, 366-68 (1983)) (the

question under the Double Jeopardy Clause whether punishments are multiple is essentially one of legislative intent). *See also United States v. Alamillo*, 941 F.2d 1085 (10th Cir. 1991) (affirming denial of habeas petition challenging supervised release on multiple grounds, including double jeopardy). Additionally, the Eighth Circuit has long recognized that a condition of mental health counseling for a sex offender is reasonably related to a child pornography offense and does not result in a greater deprivation of liberty than is reasonably necessary. *See United States v. Muhlenbruch*, 682 F.3d 1096 (8th Cir. 2012); *see also United States v. Wiedower*, 634 F.3d 490 (8th Cir. 2011).

Therefore, based on the facts before this Court, Grounds Three and Five are procedurally barred and dismissed.

D. Ground Four is without merit

Lastly, Movant asserts that he “should be resentenced in light of *Dean*.⁴ Doc. 2, p. 12. Specifically, Movant contends that under *Dean*, his “sentences should have been ran consecutively to form the 120 months sentence the court acknowledged was appropriate.” *Id.* at p. 13 [sic].

As argued by Respondent, the issue in *Dean* was whether a conviction pursuant to 18 U.S.C. § 924(c) prevented a sentencing court from considering a mandatory minimum imposed under that provision when calculating an appropriate sentence for the predicate offense. *Id.* at 1172. However, Movant was not convicted of a § 924(c) charge, but rather he was sentenced for child pornography and child obscenity offenses pursuant to 18 U.S.C. § 2252(a)(4)(B) and § 1466A(b)(2), respectively. The Court sentenced Movant to ten years concurrent on the child pornography counts and five years on the supervised release revocation, to run consecutively, after weighing the § 3553(a) factors.

⁴ *Dean v. United States*, 127 S. Ct. 1170 (2017).

As a result, Ground Four is without merit.

V. Evidentiary Hearing and Certificate of Appealability

Because the Court finds Movant has failed to demonstrate a reasonable basis for his claims that his counsel rendered ineffective assistance of counsel at various stages of the pretrial proceedings, and, in fact, are contrary to the record, Movant's motion to vacate his sentence is denied. Additionally, since the motions, files, and records conclusively show Movant is not entitled to relief, Movant's request for an evidentiary hearing is denied. *See Roundtree v. United States*, 751 F.3d 923, 925 (8th Cir. 2014) ("A Section 2255 movant is entitled to an evidentiary hearing . . . unless the motion, files, and record conclusively show he is not entitled to relief.").

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to Movant. A certificate of appealability may be issued "only if [Movant] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this standard, Movant must show that reasonable jurists debate whether the issues should have been resolved in a different manner or that the issues deserve further proceedings. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because Movant has made no such showing, the Court declines to issue a certificate of appealability.

VI. Conclusion

For the reasons explained above, Movant's *pro se* motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Doc. 1) and Motion for Recusal (Doc. 25) are DENIED, a certificate of appealability is DENIED, and this case is DISMISSED.

IT IS SO ORDERED.

/s/ Beth Phillips

BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: January 31, 2019