UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2838

Garron Gonzalez

Plaintiff - Appellant

v.

United States of America

Defendant - Appellee

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:17-cv-00171-DLH)

JUDGMENT

Before LOKEN, GRASZ, and STRAS, 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. Appellant's motion to proceed in forma pauperis is denied as moot.

February 26, 2019

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

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America, Plaintiff, vs. Garron Gonzalez, Defendant.	)	**ORDER DENYING DEFENDANT'S MOTION FOR HABEAS RELIEF** Case No. 1:11-cr-042

Garron Gonzalez, Petitioner, vs. United States of America, Respondent.	)	Case No. 1:17-cv-171

Before the Court is Defendant Garron Gonzalez's Motion to Vacate under 28 U.S.C. § 2255 filed on August 18, 2017. See Docket No. 154. The Government filed a response in opposition to the motion on October 20, 2017. See Docket No. 163. Gonzalez filed a reply on December 22, 2017. See Docket No. 167. Gonzalez filed a supplement on January 8, 2018, and an amended brief in support of his motion on February 5, 2018. See Docket Nos. 168 and 169. For the reasons outlined below, the motion is denied.

I. BACKGROUND

In January 2004, Gonzalez pled guilty to two felony counts of gross sexual imposition in state court in North Dakota. He was sentenced to five years of imprisonment, with all but 130 days suspended for five years, and five years of supervised probation. In November 2004, Gonzalez's

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supervised probation was revoked and an amended criminal judgment was entered. He was resentenced to five years of imprisonment on each count, to run concurrently, with all but 30 months suspended for five years, and five years of supervised probation. The state court also ordered Gonzalez's supervised probation was subject to certain rules and conditions, including he submit to a search of his vehicle or place of residence by any probation officer at any time of the day or night, with or without a search warrant, and he was not to have unsupervised contact with females under the age of eighteen.

On December 15, 2010, while still on supervised probation in North Dakota, his probation officer, Duane Johnson, scheduled an office visit with him. Probation Officer Johnson arranged the meeting so that a police detective from Mandan, North Dakota, could speak with Gonzalez regarding another case. When Gonzalez missed the scheduled meeting, Probation Officer Johnson and other officers went to Gonzalez's home to meet with him and search his home. During the search of Gonzalez's home and vehicle, Probation Officer Johnson seized two cell phones after a preliminary search of the phones showed a potential violation of Gonzalez's supervised probation. When questioned about the contents of the phones, Gonzalez admitted that he had been communicating with a fifteen or sixteen-year-old girl, later identified as A.G., whose name and phone number were found in the contacts lists on the phones. Gonzalez was arrested for violating the terms and conditions of his supervised probation.

The following day, December 16, 2010, a further search of the phones revealed a series of text messages between Gonzalez and A.G., including two nude photos of her genitalia and buttocks. The case was then referred to Special Agent Randy Helderop with the Department of Homeland Security.

North Dakota Bureau of Criminal Investigations Special Agent Steve Harstad retrieved the pictures and text messages sent between Gonzalez and A.G. from the two confiscated cell phones.

On March 31, 2011, Gonzalez was indicted in federal court on one count of attempted sexual exploitation of minors in violation of 18 U.S.C. §§ 2251(a) and 2251(e). A two-day jury trial commenced on April 8, 2014. At trial, A.G. testified that she was fifteen-years-old when she met Gonzalez online through a video game. Gonzalez and A.G. exchanged numbers through the video game and began text messaging and talking on the phone. When Gonzalez asked A.G.'s age, she told him she was sixteen. Eventually, Gonzalez and A.G. began discussing sexual acts and sending each other photos of themselves, some of which were nude. A.G. testified that she did not initiate sending the nude photos. Rather, she sent the nude photos because Gonzalez made her feel comfortable, gave her lots of attention, and asked for the photos. She also noted that Gonzalez would put money on her phone so that they could continue text messaging each other. A.G. indentified two nude photos found on one of Gonzalez's phones as ones she had taken of herself and sent to Gonzalez at his request. The jury found Gonzalez guilty on April 9, 2014.

On May 20, 2015, the Court sentenced Gonzalez to 300-months of imprisonment. An appeal was taken. On June 27, 2016, the Eighth Circuit Court of Appeals affirmed the conviction. See United States v. Gonzalez, 826 F.3d 1122 (8th Cir. 2016). On August 18, 2017, Gonzalez filed the instant motion to vacate under 28 U.S.C. § 2255.

II. STANDARD OF REVIEW

"28 U.S.C. § 2255 provides a federal prisoner an avenue for relief if his 'sentence was imposed in violation of the Constitution or laws of the United States, or . . . was in excess of the

maximum authorized by law.'" King v. United States, 595 F.3d 844, 852 (8th Cir. 2010) (quoting 28 U.S.C. § 2255(a)). This requires a showing of either constitutional or jurisdictional error, or a "fundamental defect" resulting in a "complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 428 (1962). A 28 U.S.C. § 2255 motion 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). A 28 U.S.C. § 2255 movant "must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). Section 2255 is "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." Davis, 417 U.S. at 343.

III. LEGAL DISCUSSION

Gonzalez's first two claims involve allegations of ineffective assistance of counsel. The other three claims pertain to alleged *Brady* violations, prosecutorial misconduct, and newly discovered evidence.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. To be eligible for habeas relief based on ineffective assistance of counsel, a defendant must satisfy the two-part test announced in Strickland v. Washington, 466 U.S. 668, 687 (1984). First, a defendant must establish that defense counsel's representation was constitutionally deficient, which requires a showing that counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. This requires showing that counsel made errors so serious that defense counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Id. at 687-88. In considering whether this showing has been accomplished, "[j]udicial scrutiny of counsel's performance must be

highly deferential." Id. at 689. If the underlying claim (i.e., the alleged deficient performance) would have been rejected, defense counsel's performance is not deficient. Carter v. Hopkins, 92 F.3d 666, 671 (8th Cir. 1996). Courts seek to "eliminate the distorting effects of hindsight" by examining defense counsel's performance from counsel's perspective at the time of the alleged error. Id.

Second, it must be demonstrated that defense counsel's performance prejudiced the defense. Strickland, 466 U.S. at 687. In other words, under this second prong, it must be proven that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." Wiggins v. Smith, 539 U.S. 510, 534 (2003). Merely showing a conceivable effect is not enough. Hill v. Lockart, 474 U.S. 52, 59 (1985). An increased prison term may constitute prejudice under the *Strickland* standard. Glover v. United States, 531 U.S. 198, 203 (2001).

There is a strong presumption that defense counsel provided "adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690; Vogt v. United States, 88 F.3d 587, 592 (8th Cir. 1996). A court reviewing defense counsel's performance must make every effort to eliminate hindsight and second-guessing. Strickland, 466 U.S. at 689; Schumacher v. Hopkins, 83 F.3d 1034, 1036-37 (8th Cir. 1996). Under the *Strickland* standard, strategic decisions that are made after a thorough investigation of both the law and facts regarding plausible options are virtually unchallengeable. Strickland, 466 U.S. at 690.

Where a defendant raises multiple claims of ineffective assistance, each claim of ineffective assistance must be examined independently rather than collectively. Hall v. Luebbers, 296 F.3d 685,

692-93 (8th Cir. 2002); Griffin v. Delo, 33 F.3d 895, 903-04 (8th Cir. 1994). Cumulative error will not justify habeas relief. United States v. Brown, 528 F.3d 1030, 1034 (8th Cir. 2008).

A. CLAIM ONE

In his first claim for relief, Gonzalez raises multiple allegations of ineffective assistance of counsel. The Government contends the various claims are conclusory and should be dismissed for that reason alone. The Court agrees. The "presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." Blackledge v. Allison, 431 U.S. 63, 74 (1977); Voytik v. United States, 778 F.2d 1306, 1308 (8th Cir. 1985); see also Carpenter v. United States, 720 F.2d 546, 548 (8th Cir. 1983) (conclusory allegations are insufficient to rebut the presumption of competency granted to defense counsel); Bryson v. United States, 268 F.3d 560, 562 (8th Cir. 2001) (conclusory allegations are insufficient to establish ineffective assistance of counsel). Nevertheless, the Court will address Gonzalez's allegations to the extent possible.

1. CONFRONTATION OF GOVERNMENT WITNESSES

Gonzalez contends defense counsel failed to adequately confront and cross-examine Special Agent Steve Harstad, Detective Todd Brandt, and A.G. The Government maintains defense counsel effectively cross-examined these witnesses.

As to Special Agent Harstad, Gonzalez contends defense counsel failed to conduct recross-examination, question the legal authority for the search of the cell phones, and inquire about metadata. Special Agent Harstad testified about the forensic examination he conducted on Gonzalez's cell

phones. See Docket No. 116, pp. 72-85. He was subject to cross-examination. See Docket No. 116, pp. 85-89. Gonzalez was under supervised probation at the time of the search, and the terms of his supervision included a search clause. As long as there is reasonable suspicion, there is no limitation on a probationary search. See United States v. Knights, 534 U.S. 112, 121 (2001). Gonzalez also questioned the metadata found on the cell phones. Phone extract reports were provided to the defense and the images depicting the sexual exploitation of the minor were made available for defense to view in the United States Attorney's Office. In addition, once the cell phones had been lawfully seized, further search of the data and images stored on the cell phones was permissible. See United States v. Hamilton, 591 F.3d 1017, 1022-24 (8th Cir. 2010) (finding reasonable suspicion to search computer of parolee, subject to search condition, for child pornography); United States v. Makeeff, 820 F.3d 995, 1003 (8th Cir. 2016) (upholding probationary search of USB drive). Any objection to the validity of a search should have been addressed in a pretrial motion rather than during examination of a witness. See Fed. R. Crim. P. 12(b)(3)(C). Gonzalez has failed to demonstrate defense counsel should have subjected Special Agent Harstad to recross-examination or that he suffered any prejudice based upon the lack of thereof.

Gonzalez also asserts his right to confrontation was violated when defense counsel failed to cross-examine Detective Todd Brandt of the Yankton, South Dakota, Police Department. Calling or recalling witnesses is a matter of trial tactics. "[A] reasoned decision not to call a witness is a virtually unchallengeable decision of trial strategy, in part because there is a considerable risk inherent in calling any witness because if the witness does not hold up well on cross-examination, the jurors might draw unfavorable inferences." Rodela-Aguilar v. United States, 596 F.3d 457, 464 (8th Cir. 2010) (internal quotations omitted). Defense counsel stated he wished to question Detective Brandt

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after A.G. testified, but apparently changed his mind after A.G. testified and a recorded interview between Detective Brandt and A.G. was admitted into evidence. Gonzalez has not explained what testimony would have been elicited from Detective Brandt or how that testimony would have helped his cause. Consequently, he has failed to demonstrate both deficient performance and prejudice.

Gonzalez contends defense counsel failed to recross-examine A.G. after her interview with Detective Brandt was played for the jury. A.G. was subjected to extensive cross-examination prior to the playing of the interview and her being released from her subpoena. The interview was played as part of jury deliberations and after the record was closed so it would not have been possible to take additional testimony at that time. See Gonzalez, 826 F.3d at 1124-25. Review of the trial transcript shows that defense counsel engaged in sixteen pages of cross-examination and two pages of recross-examination. See Docket No. 116, pp. 12-28 and 34-36. A.G.'s testimony was thorough and convincing. It is understandable that defense counsel would not want to place additional emphasis on the recorded interview Such decisions regarding trial strategy are virtually unchallengeable. Strickland, 466 U.S. at 690. In addition, Gonzalez's speculation as to what additional testimony she would have provided is insufficient to establish prejudice. See Sanders v. Trickey, 875 F.2d 205, 210 (8th Cir. 1989).

2. PRETRIAL MOTIONS

Gonzalez contends defense counsel failed to file pretrial motions, specifically a motion to suppress evidence, a motion to exclude certain evidence, and a Rule 404(b) motion. The suppression issue is the same as Gonzalez's second claim which the Court will address below. As for the other two motions, while not entirely clear, Gonzalez seems to be suggesting the two nude photographs

seized from his phone were unduly prejudicial, the indictment should have been dismissed based on lack of evidence, and his criminal history should not have been discussed in front of the jury. All three contentions fail. The two nude photographs obtained from his phone were highly probative and there was no reason to exclude them. Further, there was no basis to dismiss the indictment. The Court denied defense counsel's Rule 29 motion at the close of the Government's case, noting the Government's evidence was overwhelming. See Docket No. 116, pp. 80-83. Gonzalez's prior convictions were not discussed in front of the jury. The only reference which was made to his criminal history was that he was on supervised probation, a fact the Court found to be relevant to the basis for the search. Any pretrial motion raising these issues would have quickly been denied. Failure to file a meritless motion does not amount to ineffective assistance of counsel. United States v. Johnson, 707 F.2d 317, 320 (8th Cir. 1983). The Court finds these contentions fail both prongs of *Strickland*.

3. AUDIO INTERVIEW OF A.G.

Gonzalez contends defense counsel erred when he waived foundation objections to the admittance of the audio interview of A.G. by Detective Brandt without first consulting with him. Gonzalez's defense counsel spent much of his cross-examination of A.G. attacking A.G.'s testimony as inconsistent with her recorded interview with Detective Brandt. See Docket No. 116, pp. 12-28. Cross-examination techniques, like other matters of trial strategy, are generally entrusted to the professional discretion of counsel. See United States v. Orr, 636 F.3d 944, 952 (8th Cir. 2011). Defense counsel could have objected, but the objection would have been overruled because the defense cited the interview in an attempt to impeach A.G.'s testimony. In addition, A.G. testified as

to the foundation of the audio recording by indicating she listened to the recording and confirmed that it was a complete recording of her statement to Detective Brandt. See Docket No. 116, pp. 30-31. Consequently, Gonzalez has not established deficient performance or prejudice.

4. ADMISSION OF TEXT MESSAGES

Gonzalez contends the sent and received text messages found on his phones admitted at trial were not in their "native form" and he was thus deprived of the "rule of completeness." See Docket No. 154, p. 15. Before any witnesses testified, there was a discussion between the Court and counsel regarding what text messages would be admitted. See Docket No. 115, pp. 8-10. The Government produced a summary of the text messages exchanged between Gonzalez and A.G. but excluded any text message between Gonzalez and other persons. The text messages between Gonzalez and A.G. were admitted in their entirety. Thus, Gonzalez is mistaken. Had the other messages been introduced it would have been prejudicial to Gonzalez as he spent considerable time friending unknown females and then directing the conversations to a sexual nature and these other text messages contained some references to his prior convictions. Defense counsel can hardly be faulted for keeping irrelevant communications that would be more harmful than helpful to his client from being admitted as evidence. Defense counsel's performance in this regard was not deficient, and no prejudice has been shown.

B. CLAIM TWO

In his second claim of ineffective assistance of counsel, Gonzalez contends defense counsel was ineffective in failing to file a suppression motion challenging the constitutionality of the

probationary search which lead to the seizure of his cell phones. The Government contends any such motion would have failed. The Court agrees with the Government

In 2001, the United States Supreme Court held that "[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." Knights, 534 U.S. at 121. In this case, Gonzalez was on supervised probation, subject to a search clause, for a sex offense involving a minor. His probation officer had information from law enforcement sources that Gonzalez was having a sexual relationship with a minor, a clear violation of the terms and conditions of his supervised release. The probation officer clearly had reasonable suspicion, and the search was proper under the rationale outlined in *Knights*. Counsel is not ineffective for failing to pursue a motion to suppress that he reasonably believes would be futile. See United States v. Luke, 686 F.3d 600, 606 (8th Cir. 2012).

Interestingly, Gonzalez filed a suppression motion in conjunction with his state probation revocation proceedings, and the search was upheld. State v. Gonzalez, 862 N.W.2d 535, 538 (N.D. 2015), abrogated by State v. Ballard, 874 N.W.2d 61 (N.D. 2016). While *Ballard* altered the test used by North Dakota to evaluate a probationary search, it did not affect the validity of the search of Gonzalez's residence and vehicle which, based upon the totality of the circumstances, was supported by reasonable suspicion. This Court agrees with the North Dakota Supreme Court that the search was valid.

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C. CLAIM THREE

For his third claim for relief, Gonzalez contends the Government failed to disclose exculpatory evidence contained on A.G.'s cell phone. Gonzalez did not raise this issue on direct appeal. Relief under 28 U.S.C. § 2255 is not available to correct errors that could have been raised at trial or on direct appeal unless the movant shows cause for the default and resulting prejudice. Reid v. United States, 976 F.2d 446, 448 (8th Cir. 1992). Gonzalez has not attempted to make any such showing and, thus, his claim is barred.

A.G.'s trial testimony revealed that near the end of her relationship with Gonzalez she switched phones and telephone numbers and threw her old phone away. See Docket No. 116, pp. 18-19 and 31-33. All the text message exchanged between Gonzalez and A.G. were found on Gonzalez's phones and admitted at trial. Those messages were hardly exculpatory and do not support Gonzalez's conclusory allegations to the contrary.

D. CLAIM FOUR

In his fourth claim for relief, Gonzalez contends the prosecutor committed prosecutorial misconduct when he elicited information from Officer Johnson that was outside the scope of what the Court had ruled was permissible in a pretrial order. Gonzalez did not raise the issue of prosecutorial misconduct on direct appeal. Relief under 28 U.S.C. § 2255 is not available to correct errors that could have been raised at trial or on direct appeal unless the movant shows cause for the default and resulting prejudice. Reid, 976 F.2d at 448. Gonzalez has not made any such showing and, thus, his claim is barred.

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However, the claim fails on the merits as well. Prosecutorial misconduct is generally not a ground for federal habeas relief. Stringer v. Hedgepeth, 280 F.3d 826, 829 (8th Cir. 2002). Habeas relief on a claim of prosecutorial misconduct requires showing: (1) that misconduct in fact occurred, and (2) that the misconduct prejudicially affected the defendant's substantial rights by depriving the defendant of a fair trial. Graves v. Ault, 614 F.3d 501, 507 (8th Cir. 2010). At the outset of the trial, the Court instructed the parties as follows:

> I'm going to allow Mr. Johnson to identify himself to the jury during his direct examination and what his current position is as a probation officer and the fact that he was supervising Mr. Gonzalez in that capacity.
>
> I'll allow Mr. Johnson to talk about the fact that as a part of being on probation, Mr. Gonzalez, like every other defendant, had -- is subject to certain conditions, and one of those conditions is that he can be searched any time, any place, and that there was this search that was conducted of Mr. Gonzalez and/or his residence on whatever date it was.
>
> I don't want . . . Mr. Johnson talking about the fact that he is -- has some special status as a sex offender specialist who supervises only sex offenders. I don't want Mr. Johnson talking about the fact that he was supervising Mr. Gonzalez because of two -- one or two prior gross sexual impositions or any other sex offenses. I don't feel there's a need for Mr. Johnson to talk about the fact that as a part of the search, they uncovered multiple other communications that he was -- Mr. Gonzalez was having with minors. I want to focus on this case and not taint this case with all sorts of evidence about other potential charges, prior history involving sex offenses, things of that sort.
>
> I think it's only fair that Mr. Johnson, like any other witness, can tell the jury who he is and what his work is and what his work duties and responsibilities are. But Mr. Johnson can do all that without getting into great detail about Mr. Gonzalez's background and his criminal history, but I don't think it's fair to prohibit Mr. Johnson from talking at all about what his job is and how he became involved with Mr. Gonzalez. I think the jury needs to know that, but they – and I'll leave it at that.

See Docket No. 115, pp. 29-31.

There is no evidence in the record that any misconduct or violation of the Court's instruction occurred at trial. The Court has reviewed the entirety of Officer Johnson's testimony, including cross-

examination by defense counsel, and finds nothing inappropriate. See Docket No. 115, pp. 42-71. No objections to Officer Johnson's testimony based upon the Court's instruction were interposed. And based upon the Court's review of the transcript, no such objections were warranted, and none would have been sustained.

As for Gonzalez's suggestion of improper vouching during closing arguments, the Court finds this contention has also been defaulted. In addition, the prosecutor's argument that A.G. had no motivation to fabricate her testimony is not improper vouching. See Docket No. 116, p. 103. The prosecutor simply noted there was no testimony suggesting A.G. had any motivation to lie and that it was law enforcement that came to her rather than vice versa. Improper vouching usually involves the prosecutor expressing a personal opinion about credibility, impliedly guaranteeing truthfulnness, or implying knowledge of facts unknown to the jury. See Bass v. United States, 655 F.3d 758, 761 (8th Cir. 2011). Comments on the evidence are not improper and neither are evidence-based arguments regarding witness credibility. Id. The alleged vouching at issue here was simply a comment on the evidence and such comments are not improper.

E. CLAIM FIVE

In his fifth claim for relief, Gonzalez contends he never received any discovery material relating to a meeting between A.G. and Special Agent Helderop which occurred the day before trial. Gonzalez states he first heard of this meeting at the sentencing hearing and now contends it is newly discovered evidence. Gonzalez also contends Probation Officer Johnson's testimony in the state court suppression hearing and/or revocation hearing held in relation to state court revocation proceedings, contradicted his incident report dated January 2, 2011.

This issue was not raised on direct appeal. Relief under 28 U.S.C. § 2255 is not available to correct errors that could have been raised at trial or on direct appeal unless the movant shows cause for the default and resulting prejudice. Reid, 976 F.2d at 448. Gonzalez has not attempted to make any such showing regarding either of these allegations and thus his claims are barred.

The claims fail on the merits as well. The Government points out that the interview Gonzalez mentions was simply pretrial preparation which included the discussion of trial procedure and refreshing the witness's recollection regarding past statements, which includes confirming the veracity of the statements. Typically, if the witness corrects anything from prior statements, the case agent then creates a new report which would be disclosed. Otherwise, a new report would not be created. In this case, no new report was created so there was nothing to disclose.

It is undisputed that the state court revocation and suppression hearings were held after the trial in this matter. The trial in federal court was held on April 8 and 9, 2014. The state court suppression hearing was held in May 2014 and the revocation hearing was held in June 2014. See Gonzalez v. State, 893 N.W.2d 473, 474 (N.D. 2017). Thus, this testimony is not relevant to the trial and any contradictions therein do not have any bearing on the validity of Gonzalez's conviction in federal court.

F. REQUEST FOR HEARING

Gonzalez has requested the Court hold an evidentiary hearing on his motion. 28 U.S.C. § 2255 provides a hearing is required "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). No hearing is required when the claim is inadequate on its face or if the record, files, and motion conclusively

demonstrate the defendant is not entitled to the relief he seeks. Anjulo-Lopez v. United States, 541 F.3d 814, 817 (8th Cir. 2008). In this case, the record is well-established and Gonzalez's allegations are not complex. A careful review of all the materials submitted by the parties, the entire file, the trial and sentencing transcripts, and the Presentence Investigation Report, leads the Court to conclude that an evidentiary hearing is unnecessary for a full consideration of the issues raised in Gonzalez's motion.

IV. CONCLUSION

The Court has carefully reviewed the entire record, the parties' filings, and the relevant case law. The evidence against Gonzalez in this case was overwhelming. The text messages and nude images contained on Gonzalez's phone amounted to a smoking gun. Whatever perceived errors Gonzalez contends infected his trial pale in comparison to the evidence of his guilt and do nothing to shake the Court's confidence in the outcome of the trial. For the reasons set forth above, Gonzalez's motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 (Docket No. 154) is **DENIED**. The Court also issues the following **ORDER**:

1) The Court certifies that an appeal from the denial of this motion may not be taken in forma pauperis because such a appeal would be frivolous and cannot be taken in good faith. Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

2) Based upon the entire record before the Court, dismissal of the motion is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings. Therefore, a certificate of appealability will not be issued by this Court. Barefoot v. Estelle, 463 U.S. 880, 893 n. 4 (1983). If the defendant desires further review of his motion, he may request the issuance of a certificate of appealability by a circuit judge with the Eighth Circuit Court of Appeals.

IT IS SO ORDERED.

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Dated this 15th day of May, 2018.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court

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