No. 18-4109

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH ROSE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Kenneth Rose, a federal prisoner proceeding pro se, appeals the district court's denial of his motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C. § 2255. This court construes Rose's timely notice of appeal as an application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b)(2). Rose has filed a motion to stay the appellate proceedings and to remand the matter to the district court for assignment to a different judge and rulings on his pending motions, a motion to proceed in forma pauperis, and a motion for the appointment of counsel.

Rose pleaded guilty to three counts of production of child pornography, in violation of 18 U.S.C. § 2251. He reserved his right to appeal the district court's denial of his motion to suppress evidence seized during a search of his apartment and the denial of his motion to dismiss the superseding indictment. The trial court sentenced Rose to a total of 612 months of imprisonment to be followed by a life term of supervised release. On appeal, Rose challenged the district court's rulings on his motion to suppress, motion for a suppression hearing, and motion to dismiss. This court affirmed, and the Supreme Court denied Rose's petition for a writ of certiorari. *United States v. Rose*, 714 F.3d 362, 364 (6th Cir.), *cert. denied*, 571 U.S. 910 (2013).

APPENDIX A

In his § 2255 motion, Rose raised the following grounds for relief: (1) the district court improperly denied his motion to suppress; (2) the district court abused its discretion by refusing to reopen the suppression hearing when presented with new evidence; (3) the district court erred in denying his motion to dismiss the superseding indictment because all his activities were intrastate; and (4) trial and appellate counsel provided ineffective assistance. The district court denied Rose's motion, finding that claims one through three were previously raised on direct appeal and rejected by this court and that Rose's ineffective-assistance claims lacked merit. The court declined to issue a COA.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where the petition was denied on procedural grounds, the petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

I. Claims raised on direct appeal

"[A] § 2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances, such as an intervening change in the law." *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999).

In his first claim, Rose argued that the district court should have granted his motion to suppress the evidence seized during the search of his apartment because "[t]he search warrant affidavit was overbroad, non-particular, lacked a 'substantial basis' to connect address—actually searched . . . to suspect, location of forced sex, or location of a computer in room somewhere, and lacked any semblance of probable cause." He contended that "a reasonable officer could not rely in good faith on a facially invalid warrant affidavit." On direct appeal, this court considered these

very arguments and ultimately rejected Rose's claim. *Rose*, 714 F.3d at 365-69. The court found that there was no probable cause to search the apartment because the search warrant affidavit failed to establish the necessary link between Rose and the address to be searched. *Id.* at 365-67. The court, however, applied the good-faith exception to the exclusionary rule and upheld the denial of Rose's suppression motion. *Id.* at 367-69. Rose has not identified any intervening change in the law or other exceptional circumstance that would warrant reconsideration of this claim.

In his second claim, Rose argued that the district court erred in denying his motion to reopen the suppression hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). Rose asserted that the investigator omitted information from the search warrant affidavit and made misrepresentations, which came to light only when he received the officers' unredacted notes and videotaped interviews of the victims after the suppression hearing. Again, this court considered and rejected this claim on direct appeal, concluding that Rose could not "make a substantial showing that the affiant provided statements in the affidavit that he knew to be false." *Rose*, 714 F.3d at 370. Rose's disagreement with this court's ruling is not an extraordinary circumstance that would warrant reconsideration of the claim in a § 2255 proceeding.

Rose's third claim challenged the district court's ruling on his motion to dismiss the superseding indictment on the ground that the activity underlying the charges did not involve interstate commerce. This court rejected this argument on direct appeal, *id.* at 370-71, and Rose has provided no basis for relitigating the issue in a § 2255 motion.

No reasonable jurist could debate the district court's rejection of Rose's attempt to relitigate his claims challenging the district court's rulings on his motion to suppress, motion for a suppression hearing, and motion to dismiss the superseding indictment.

II. Ineffective assistance of trial and appellate counsel

To establish ineffective assistance of counsel, a petitioner must show both that his attorney's performance was deficient and that his defense was prejudiced by counsel's alleged errors. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In a guilty plea context, while the performance prong of the *Strickland* test remains the same, to establish prejudice the petitioner

"must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In his first ineffective-assistance claim Rose argued that trial counsel was ineffective during plea negotiations because he failed to advise him that he could be sentenced to consecutive sentences. The district court denied relief on this claim, finding that, even if counsel had failed to inform him of the potential for consecutive sentences, Rose was notified of this possibility at multiple points throughout the proceeding, including in the written plea agreement, by the prosecutor at the plea hearing, and by the district court at the plea hearing. Reasonable jurists could not debate the district court's conclusion that, on this record, Rose could not show that, had counsel advised him about consecutive sentencing, he would not have pleaded guilty and would have insisted on going to trial. *See Hill*, 474 U.S. at 59.

Rose next argued that counsel failed to investigate fully the basis for his motion to suppress. He contended that counsel did not adequately distinguish or analogize his case to those discussed by this court in denying his suppression argument on appeal. But Rose has failed to show how a fuller or more developed argument by counsel would have changed the ultimate determination that the good-faith exception applied. Indeed, on direct appeal, this court thoroughly discussed the cases cited by Rose and came to a reasoned conclusion based on that authority and the facts presented in this case. *Rose*, 714 F.3d at 367-69. To the extent Rose identifies other cases that counsel should have cited, he does not demonstrate that those cases compel a different conclusion on the suppression issue. No reasonable jurist would debate the district court's denial of relief on this claim.

Rose's next claim asserted that appellate counsel provided ineffective assistance when he failed to file a petition for rehearing en banc in this court on the ground that this court misapplied *United States v. Watson*, 498 F.3d 429 (6th Cir. 2007). According to Rose, this court "erroneously reported that *Watson* held that the Sixth Circuit . . . require[s] neither the search warrant, nor affidavit, to provide an address." But that is not how this court characterized *Watson*. Rather, the court simply noted that, in *Watson*, neither the warrant nor the affidavit provided an address, but

the court applied the good-faith exception in that case. Because an argument that this court misapplied *Watson* would have been meritless, reasonable jurists could not disagree with the district court's determination that appellate counsel was not ineffective for failing to petition for en banc rehearing on that basis. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013).

Rose next argued that appellate counsel was ineffective for failing to raise the "prima facie significance" of the evidence and arguments that he presented in the § 2255 proceedings. In rejecting this claim, the district court explained that Rose had been permitted to present his affidavits dated June 13, 2015, and March 22, 2018, but noted that the information in these affidavits consisted of Rose's legal arguments and information that was already part of the record. This claim appears to be yet another attempt by Rose to relitigate the claims raised on direct appeal but under the guise of an ineffective-assistance claim. Reasonable jurists could not debate the district court's rejection of this claim because Rose failed to show how the information in these affidavits would have changed the result of the appeal. *See Strickland*, 466 U.S. at 687.

Finally, Rose asserted that appellate counsel was ineffective for failing to raise claims of trial counsel's ineffectiveness. Because claims of ineffective assistance of counsel are generally disfavored on direct appeal and are more appropriately brought in a § 2255 motion, *see Massaro v. United States*, 538 U.S. 500, 504-07 (2003), reasonable jurists would not debate the district court's determination that appellate counsel was not ineffective for failing to raise trial-counsel claims on direct appeal.

Accordingly, Rose's application for a COA, motion for a stay and remand, and motion to appoint counsel are **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 18-4109

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH ROSE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: GUY, COOK, and GRIFFIN, Circuit Judges.

Kenneth Rose, a federal prisoner, petitions for rehearing of our July 10, 2019, order denying his motion for a certificate of appealability. We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in denying Rose's motion for a certificate of appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, the petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Kenneth Rose,

Petitioner,

v.

Case No. 1:09cr047
(1:14cv809)

United States of America,

Judge Michael R. Barrett

Respondent.

OPINION & ORDER

This matter is before the Court on Petitioner's Motion to Vacate under 28 U.S.C. § 2255 (Doc. 125); Petitioner's Corrected Supplemental Memorandum (Doc. 130); and Petitioner's Amended Motion to Vacate under 28 U.S.C. § 2255. (Doc. 190). The United States filed a Response. (Doc. 134).

Also pending before the Court are Petitioner's first Motion to Expand the Record. (Doc. 184); Petitioner's second Motion to Expand the Record (Doc. 186); Petitioner's Motion to Take Judicial Notice (Doc. 187); Petitioner's Motion to Alter or Amend Judgment (Doc. 188); and Petitioner's Superceding Motion to Alter Judgment (Doc. 189).

I. BACKGROUND

In the Superseding Indictment, Petitioner was charged with twenty-two counts of production of child pornography (18 U.S.C. § 2251(a)) and one count of possession of child pornography (18 U.S.C. § 2252(a)(4)). Petitioner entered a plea of guilty to three counts of the Superseding Indictment. Petitioner was sentenced to a total term of imprisonment of 612 months, to be followed by lifetime supervised release. (Doc. 106). Petitioner's plea agreement permitted him to appeal certain decisions by this Court. On

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direct appeal, this Court was affirmed by the Sixth Circuit. *United States v. Rose*, 714 F.3d 362 (6th Cir. 2013). Petitioner's writ of certiorari was denied by the United States Supreme Court. *Rose v. United States*, 134 S.Ct. 272 (2013).

The relevant facts of this case are set forth in the Sixth Circuit's opinion:

> In November 2008, the Personal Crimes Unit of the Cincinnati Police Department began investigating allegations that Kenneth Rose sexually abused three minors. When the police interviewed the minors, they said that Rose had sexually molested and/or raped them and that he had shown them pornographic images on a computer in his bedroom. As a result of the interviews, the police sought to obtain a search warrant for 709 Elberon Ave., Cincinnati, OH. The application for the search warrant asked for permission to search for computers and computer-related materials in support of an investigation under Ohio's rape statute, Ohio Rev.Code § 2907.02.
>
> The front page of the search warrant identified "Kenneth Rose" as the subject of the search, and immediately below Rose's name, it identified the location to be searched as "709 Elberon Av. [sic], Cincinnati, Hamilton County, Ohio 45205." The warrant described the physical attributes of the address, including that the name "Rose" appeared over the doorbell of apartment number one. Attached to the warrant was a photograph of the property taken from the Hamilton County Auditor's website. The supporting affidavit summarized the testimony of the three victims, including testimony that Rose had shown two of the victims pornographic images on a computer "located in his room" or "located in his bedroom." The third victim testified that he engaged in nonconsensual sexual activity with Rose beginning in July 2008. The affidavit explained that the police sought to obtain computers and related documentation.
>
> Nowhere in the affidavit did the affiant, Police Officer Chris Schroder, provide Rose's address. Nevertheless, the magistrate judge granted Officer Schroder's request for the search warrant.
>
> Police executed the warrant on November 12, 2008 and seized, among other items, a laptop computer. Forensic analysis of the computer revealed numerous images of child pornography, several of which included Rose engaged in sexual conduct with several male minors under the age of sixteen.

714 F.3d at 365.

II. ANALYSIS

A. Motions to Expand the Record

Rule 7 of the Rules Governing § 2255 Proceedings states that "[t]he materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record." 28 U.S.C.A. foll. § 2255. In his first Motion to Expand the Record (Doc. 184), Petitioner seeks to expand the record with his affidavit. This affidavit consists primarily of an annotated version of the affidavit for the search warrant for 709 Elberon Avenue. The Court finds Petitioner's first Motion to Expand well-taken and accordingly, the Motion is GRANTED.

Petitioner's second Motion to Expand the Record seeks to expand the record to include a letter dated December 20, 2017 from the student editors at Annual Review of Criminal Procedure. (Doc. 186). This letter does not predate the filing of Petitioner's petition. Therefore, second Motion to Expand the Record (Doc. 186) is DENIED.

B. Petitioner's Motion to Take Judicial Notice

In his Motion to Take Judicial Notice, Petitioner seeks to have this Court take judicial notice of certain facts based on the exhibits attached to the Motion. (Doc. 187).

Federal Rule of Evidence 201 provides:

> (b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201. The Court determines that the facts enumerated in Petitioner's Motion

do not fall in either category. Therefore, Petitioner's Motion to Take Judicial Notice is DENIED.

C. Motion to Alter or Amend Judgment

In Petitioner's Motion to Alter or Amend Judgment (Doc. 188), Petitioner asks this Court to stay these proceedings to allow the Sixth Circuit to decide motions Petitioner has filed with in his direct appeal case: *U.S.A. v. Kenneth Rose*, No. 11-4313. As this Court has previously explained, on December 22, 2016, the Sixth Circuit denied Petitioner's Motion to Recall the Mandate. (Case No. 11-4313, Doc. 53-1). In subsequent letters from the Clerk for the Sixth Circuit Court of Appeals, Petitioner was advised that his case was closed and therefore the Clerk was returning motions tendered by Petitioner. (Case No. 11-4313, Docs. 54-2, 56-3). The Clerk explained that these motions were not being filed because his case was closed. Accordingly, the subsequent motions tendered by Petitioner were not filed by the Clerk. Therefore, there are no motions pending before the Sixth Circuit, and the Court finds no basis for ordering a stay of these proceedings. Accordingly, Petitioner's Motion to Alter or Amend Judgment (Doc. 188) is **DENIED**.

D. Superceding Motion to Alter Judgment

In Petitioner's Superceding Motion to Alter or Amend Judgment (Doc. 189), Petitioner again asks this Court to stay these proceedings to allow the Sixth Circuit to decide motions Petitioner has filed with in his direct appeal case: *U.S.A. v. Kenneth Rose*, No. 11-4313. This Motion (Doc. 189) is DENIED for the same reasons the Court denied Petitioner's original Motion to Alter or Amend Judgment.

E. Motion to Vacate under 28 U.S.C. § 2255

A prisoner seeking relief under 28 U.S.C. § 2255 must allege either "(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 491, 496-97 (6th Cir. 2003) (citing *Weinberger v. U.S.*, 268 F.3d 346, 351 (6th Cir. 2001), *cert. denied*, 535 U.S. 967).

Petitioner identifies the following grounds for relief: (1) this Court improperly denied his motion to suppress; (2) this Court abused its discretion in refusing to reopen suppression hearing when presented with new evidence; (3) this Court erred in denying Petitioner's motion to dismiss the Superseding Indictment because his acts were wholly intrastate; (4) ineffective assistance of trial counsel; and (5) ineffective assistance of appellate counsel.

Petitioner's first ground for relief is based on this Court's denial of Petitioner's motion to suppress. Petitioner argues that the search warrant affidavit for 709 Elberon Avenue was overbroad and lacked probable cause. Petitioner explains that the search warrant failed to establish probable cause to believe that evidence of the rape described in the warrant would be found on a computer in the apartment. Petitioner also argues that a reasonable officer would not rely on a facially invalid warrant affidavit.

The Sixth Circuit has recently summarized the good-faith exception to suppression as follows:

> "When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Carpenter*, 360 F.3d 591, 595 (6th Cir. 2004) (en banc) (quoting *Illinois v. Krull*, 480 U.S. 340, 347, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)). There is, however, "an exception to the exclusionary rule where 'the officer