UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CHRISTIAN JOSEPH PEREZ	§	
	§	
Petitioner	§	
VS.	§	CIVIL ACTION NO. 5:18-CV-82
	§	CRIM. ACTION NO. 5:16-CR-1284
UNITED STATES OF AMERICA	§	

MEMORANDUM & ORDER

Petitioner Christian Joseph Perez, USM No. 19381-479, is a federal inmate confined by the Bureau of Prisons. (Dkt. 1 at 1.[1]) In June of 2017, U.S. District Judge George P. Kazen sentenced Petitioner to 120 months in prison after he pleaded guilty to coercion and enticement of a minor. (Cr. Dkt. 46 at 1–2.) Now before the Court is Petitioner's pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (Dkt. 1; Cr. Dkt. 48.) The Court has examined Petitioner's motion in accordance with Rule 4 of the Rules Governing § 2255 Proceedings. Because it plainly appears from the motion and the record of prior proceedings that Petitioner's claims are without merit, his motion must be denied.

Factual Background

On October 4, 2016, an undercover Homeland Security Investigations agent ("the UC") responded to an ad Petitioner had posted online expressing his interest in incestuous relationships. (Cr. Dkt. 4 at 2; Cr. Dkt. 35 at 1.) The UC posed as an adult male who was sexually abusing his girlfriend's 14-year-old daughter. (Cr. Dkt. 35 at 1.) The UC offered the child to Petitioner for sex, and Petitioner detailed to the UC the sexual acts he wished to perform with her. (Cr. Dkt. 4 at 2.) When asked if he was bothered by the child's age, Petitioner

[1] "Dkt." indicates a citation to the record in Civil Action No. 5:18-CV-82. "Cr. Dkt." indicates a citation to the record in Petitioner's underlying criminal case, Criminal Action No. 5:16-CR-1284.

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responded: "No, the age doesn't bother me a bit. I love young girls." (Cr. Dkt. 35 at 1.) Petitioner and the UC arranged to meet at a Laredo business on October 20, 2016 so that Petitioner could engage in sexual activity with the child.[2] (Cr. Dkt. 4 at 2; Cr. Dkt. 35 at 2.) Petitioner drove to Laredo from his home in Austin and was arrested upon arrival at the designated meeting location. (Cr. Dkt. 4 at 2; Cr. Dkt. 39 at 5–6.) The following month, a Laredo grand jury indicted Petitioner for possession of child pornography and attempted coercion and enticement of a child. (Cr. Dkt. 12.) Petitioner pleaded guilty to the enticement charge in exchange for the dismissal of the child pornography charge. (Cr. Dkt. 33; *see* Cr. Dkt. 39 at 4.) In June of 2017, U.S. District Judge George P. Kazen sentenced Petitioner to the statutory minimum of ten years imprisonment. (Cr. Dkt. 46 at 1–3.) *See* 18 U.S.C. § 2422(b).

Petitioner has now filed a § 2255 motion seeking to vacate his conviction and sentence.[3] (*See* Dkt. 1 at 48.) Although Petitioner has divided his allegations into three grounds for relief, they all arise from the same alleged defect in the factual basis of his plea. In short, Petitioner claims that the factual statements supporting the plea, although true, fail to allege an essential element of the crime. (*Id.* at 19–48.) In light of this central infirmity, Petitioner argues that (1) his attorney rendered ineffective assistance by encouraging him to plead guilty rather than moving to dismiss the indictment (*id.* at 4–6); (2) the factual basis of his plea agreement was

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[2] It is unclear whether Petitioner expected the child to be present at the initial meeting location. The factual basis of the plea agreement says only that Petitioner "travelled to Laredo to meet the UC *and* child." (Cr. Dkt. 35 at 2. (emphasis added)) The criminal complaint, however, states that Petitioner expected to meet the UC alone and then travel together to the UC's home to engage in sexual activity with the child. (Cr. Dkt. 4 at 2.)

[3] Petitioner has also filed an application to proceed *in forma pauperis*. (Dkt. 2; Cr. Dkt. 49.) However, because a § 2255 motion is in effect a continuation of the underlying criminal case, Petitioner need not pay a civil filing fee. *United States v. Cole*, 101 F.3d 1076, 1077 (5th Cir. 1996); *see United States v. Moore*, 2009 WL 189294, at *1 (S.D. Tex. Jan. 26, 2009). His application to proceed *in forma pauperis* will therefore be denied as moot.

constitutionally insufficient (*id.* at 7); and (3) the Court itself erred by accepting his guilty plea without recognizing the insufficiency of the factual basis (*id.* at 9).

Legal Standard

A federal prisoner may move to vacate, set aside, or correct his sentence if: (1) the sentence was imposed in violation of the Constitution or the laws of the United States; (2) the district court was without jurisdiction to impose the sentence; (3) the sentence imposed was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). Generally, a defendant may waive his right to relief under § 2255 in his plea agreement so long as the waiver is knowing and voluntary. *See United States v. Ramirez*, 416 F. App'x 450, 452–53 (5th Cir. 2011) (per curiam). However, even a valid waiver "does not bar review of a claim that the factual basis for a guilty plea fails to establish the essential elements of the crime of conviction." *United States v. Trejo*, 610 F.3d 308, 312 (5th Cir. 2010); *see United States v. Crain*, 877 F.3d 637, 645 (5th Cir. 2017). Rather, a court must determine that there is an adequate factual basis for each element of the offense before it may enforce the waiver against any additional arguments raised on collateral attack. *United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008).

Discussion

The essence of all three of Petitioner's nominally separate claims is that the factual basis supporting his plea agreement lacks allegations as to an essential element of the offense. (*See* Dkt. 1 at 19–20.) Thus, even though Petitioner waived his collateral-attack rights in his plea agreement (Cr. Dkt. 33 at 4), his § 2255 motion survives because "[e]ven valid waivers do not bar a claim that the factual basis is insufficient to support the plea." *Crain*, 877 F.3d at 645 (quoting *Hildenbrand*, 527 F.3d at 474). The Court will therefore consider his argument on its

merits.

The statute under which Petitioner was convicted, 18 U.S.C. § 2422(b), requires the Government to prove four elements:

> (1) [The defendant] used a facility of interstate commerce to commit the offense; (2) he was aware that [the intended victim] was younger than eighteen; (3) by engaging in sexual activity with [the intended victim], he could have been charged with a criminal offense under Texas law; and (4) he knowingly persuaded, induced, enticed, or coerced [the intended victim] to engage in criminal sexual activity.

United States v. Rounds, 749 F.3d 326, 333 (5th Cir. 2014). To prove *attempted* enticement, the Government must also show that the defendant took a "substantial step" toward realizing his intent to persuade, induce, entice, or coerce a child into sexual activity. *United States v. Broussard*, 669 F.3d 537, 547 (5th Cir. 2012). "Mere preparation" alone is not a substantial step; the defendant must have engaged in "conduct which strongly corroborates the firmness of [his] criminal attempt." *United States v. Barlow*, 568 F.3d 215, 219 (5th Cir. 2009) (quoting *United States v. Farner*, 251 F.3d 510, 513 (5th Cir. 2001)).

Petitioner admits all the facts used by the Government to support his plea; he challenges only whether those facts are sufficient to show the culpable intent and "substantial step" required by the final element of the statute. (Dkt. 1 at 27–28.) In his view, he lacked the intent required to coerce or entice a *child* because his communications were directed exclusively to the adult UC. (*Id.*) In addition, he argues that his conduct cannot support an attempted enticement conviction because he did not take a "substantial step" toward engaging in prohibited sexual activity. (*Id.* at 35–47.) The Court will address each of these claims in turn.

A. Intent

Petitioner acknowledges that a defendant may violate 18 U.S.C. § 2422(b) solely by communicating with an adult whom he knows to be an adult if he "direct[s] some of his intended

inducements to the [child]," as by sending explicit photos or videos with instructions for the adult to show them to the child. *United States v. Olvera*, 687 F.3d 645, 647–48 (5th Cir. 2012) (per curiam). (*See* Dkt. 1 at 30.) However, Petitioner attempts to distinguish his own conduct from the conduct described in *Olvera* on the ground that he spoke only with the adult UC *and* he never directed any communications to the (fictitious) child herself. (*Id.* at 4–5, 28–31.) In his view, a defendant cannot "knowingly . . . entice[]" a minor if none of his conduct is aimed directly at her. *Rounds*, 749 F.3d at 333. (*See* Dkt. 1 at 30–31.)

Petitioner might have gained traction with this argument in the immediate aftermath of *Olvera*. After all, the *Olvera* court "expressly reserved judgment" on whether a defendant who "did not seek to have any of his communications with the adult [intermediary] passed on directly to a child" may nevertheless be liable under § 2422(b). *United States v. Caudill*, 709 F.3d 444, 446 (5th Cir. 2013); *see Olvera*, 687 F.3d at 648. By the time of Defendant's indictment, however, the Fifth Circuit had resolved that question in the affirmative. In *Caudill*, the court held that although "a defendant's acts must target a child, the terms 'persuade,' 'induce,' 'entice,' or 'coerce' do not require that . . . a perpetrator must request an intermediary to convey the perpetrator's communications to a minor." *Caudill*, 709 F.3d at 447. Rather, the statutory prohibition encompasses any conduct that aims to "indirectly secure[] a child's assent to unlawful sexual activity through an adult intermediary." *Id.* In *Caudill*, that conduct took the form of emails to an undercover police officer seeking "confirmation that the [intended child victims] would engage in . . . deviate sexual intercourse and agree[ing] to pay their caretaker one hundred dollars to take them to a hotel for the contemplated encounter." *Id.* Although the record in this case does not indicate that Petitioner ever discussed payment with the UC, Petitioner admits that he corresponded with the UC with the express goal of arranging a sexual encounter

with a minor. (*See* Dkt. 1 at 35.) Because that admission "make[s] abundantly clear that he anticipated the [UC] would lead [Petitioner's intended victim] to submit to sexual activity," no evidence of communications directed at the minor is required. *Caudill*, 709 F.3d at 447.

In fact, following *Caudill*, the Fifth Circuit has repeatedly affirmed convictions based on conduct nearly identical to Petitioner's. In *United States v. Montgomery*, for example, the defendant had attracted the attention of law enforcement by posting an ad for sex on Craigslist. 746 F. App'x 381, 383 (5th Cir. 2018) (per curiam). An undercover FBI agent posing as the mother of a ten-year-old daughter responded to the ad stating that "she was looking 'to watch somebody be engaged in sexual activity with her child' for purposes of her sexual stimulation." *Id.* (internal alterations omitted). Over the next few weeks, the defendant expressed interest in the agent's proposition, "described how he would engage in sexual contact with the child," and eventually arranged a meeting with the agent and the fictitious child. *Id.* Just like Petitioner, the defendant was arrested upon arrival at the designated meeting place. *Id.* at 384. And just like Petitioner, the defendant later sought to vacate his conviction on the ground he lacked the requisite intent to violate § 2422(b). *Id.* Citing *Caudill*, the Fifth Circuit flatly rejected the defendant's argument that "a violation of § 2422(b) . ... requires [that the] defendant's interaction with the intermediary be aimed at transforming or overcoming the child's will." *Id.* The court emphasized that "our circuit requires only that defendant take actions directed toward obtaining the child's assent through an intermediary." *Id.* at 385. That may be achieved solely by "relying on a parent's influence or control over the child"; no conduct need be directed at the child herself.[4] *Id.*

[4] Petitioner suggests that the case law on adult intermediaries applies only to parents and legal guardians of intended victims. (Dkt. 1 at 34–35.) He argues that because the UC claimed only to be dating the intended victim's mother, Petitioner could not have known whether the UC

Caudill's holding is not up for debate. The Fifth Circuit has reached the same conclusion in at least two other cases involving defendants who attempted to arrange sexual encounters with minors through adult intermediaries without directing any communications to the minors themselves. *See United States v. Andrus*, 745 F. App'x 235, 236 (5th Cir. 2018); *United States v. Wicks*, 586 F. App'x 176, 177–78 (5th Cir. 2014) (per curiam); *see also United States v. Howard*, 766 F.3d 414, 421 n.7 (5th Cir. 2014) ("The Fifth Circuit has held the nonexistence of the minor and communication through an adult intermediary are not viable defenses to criminal liability under § 2422(b)."). As the court recently noted, any argument that "§ 2422(b) requires the defendant to make or attempt making direct contact with the minor victim . . . is foreclosed by *Caudill*." *Andrus*, 745 F. App'x at 236. Because Petitioner's communications were aimed at obtaining the child's assent by way of the UC, they plainly satisfy the statute's intent requirement.

B. Substantial Step

Petitioner argues that even if the facts supporting his guilty plea establish the requisite intent, they fail to show that he made a "substantial step" toward realizing that intent. (Dkt. 1 at 5, 35–47.) *See Broussard*, 669 F.3d at 547. Petitioner admits that he arranged to meet the UC at a designated location in Laredo and that he in fact drove to that location on the specified day. (Dkt. 1 at 47.) However, he argues that "the meeting was never finalized" because he was arrested before he could send a text message notifying the UC of his arrival. (*Id.*; *see* Cr. Dkt. 35 at 2.) In

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had enough "influence or control over the minor" to actually induce her assent to sexual activity. (*Id.* at 34.) However, Petitioner clearly relied on the assumption that the UC *did* have control over the minor when he accepted the UC's offer of sex with her and traveled from Austin to Laredo to take him up on it. (Cr. Dkt. 4 at 2; Cr. Dkt. 39 at 5–6.) Moreover, courts across the country have upheld § 2422(b) convictions predicated on communications with adult intermediaries who offered their girlfriends' children for sex. *See, e.g., United States v. Worsham*, 479 F. App'x 200, 205 (11th Cir. 2012) (per curiam); *United States v. Lanzon*, 613 F. Supp. 2d 1348, 1349 (S.D. Fla. 2009).

his view, without this final piece, neither the scheduling of the meeting nor his arrival at the agreed-upon location constitutes a substantial step toward completion of the crime. He attempts to distinguish contrary case law on the same ground discussed above—that in most cases the defendant had communicated directly with a minor or an undercover agent posing as a minor, not with an adult intermediary. (*See* Dkt. 1 at 41–47.)

Petitioner's argument is unavailing. Controlling case law clearly holds that "[t]ravel to a meeting place is . . . sufficient to establish" a substantial step toward an attempt to violate § 2422(b). *Howard*, 766 F.3d at 421; *see United States v. Lundy*, 676 F.3d 444, 449 (5th Cir. 2012) ("[The defendant] also showed up at the location of the meeting . . . which indicates a substantial step towards completion of the crime."). This is true regardless of whether the defendant expected to meet the minor or only the minor's adult intermediary at the designated location. *See United States v. Salcedo*, 924 F.3d 172, 175 (5th Cir. 2019) (per curiam). Moreover, the defendant need not make actual contact with anyone at the meeting location. Even abandoning the attempt by leaving the location early cannot "undo the substantial steps [a defendant] ha[s] already taken" by arranging and traveling to the meeting. *Barlow*, 568 F.3d at 219–20.

In short, controlling Fifth Circuit precedent establishes that Petitioner possessed the requisite intent to violate § 2422(b) and took a substantial step toward completing that violation. Thus, the factual basis of Petitioner's guilty plea is sufficient to support his conviction, Petitioner is not entitled to collateral relief, and his § 2255 motion must be denied. Because Petitioner has not raised "a factual dispute which, if resolved in [his] favor, would entitle him to relief," the Court must also deny his accompanying motion for discovery. *Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir. 2000); *see Thaw v. United States*, 2016 WL 7839181, at *1 (N.D. Tex. July 19,

2016).

Conclusion

For the foregoing reasons, Petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Dkt. 1; Cr. Dkt. 48) is DENIED. Petitioner's application to proceed *in forma pauperis* (Dkt. 2; Cr. Dkt. 49) is DENIED as MOOT. Petitioner's motion for discovery (Dkt. 3; Cr. Dkt. 50) is DENIED. Finally, Civil Action No. 5:18-CV-82 is hereby DISMISSED with PREJUDICE.

Because the Court finds that Petitioner makes no substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c)(2). The Court certifies that any appeal from this decision would not be taken in good faith and therefore should not be taken *in forma pauperis*. *See* 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3).

The Clerk of Court is DIRECTED to mail Petitioner a copy of this Order by Federal Express at the address indicated in his most recent filing. The Clerk is further DIRECTED to TERMINATE this case.

IT IS SO ORDERED.

SIGNED this 12th day of July, 2019.

Diana Saldaña
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-40714

A True Copy
Certified order issued Jul 16, 2020
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHRISTIAN JOSEPH PEREZ,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

O R D E R:

Christian Joseph Perez, federal prisoner # 19381-479, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2255 motion challenging his guilty plea conviction for attempting to coerce and entice a minor to engage in criminal sexual activity. He also moves for leave to proceed in forma pauperis (IFP) on appeal. Perez contends that (1) his trial counsel advised him ineffectively in relation to his guilty plea; (2) his guilty plea is not supported by an adequate factual basis; and (3) the district court therefore erred by accepting his guilty plea.

To obtain a COA, Perez must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet that burden, he must show 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).

Perez fails to make the requisite showing. Accordingly, the motion for a COA is DENIED. The motion to appeal IFP is DENIED AS MOOT.

/s/Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals for the Fifth Circuit

No. 19-40714

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

CHRISTIAN JOSEPH PEREZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:18-CV-82

Before HIGGINBOTHAM, SMITH, and OLDHAM, *Circuit Judges*.

PER CURIAM:

A member of this panel previously DENIED Appellant's motion for certificate of appealability and further denied as moot the motion to proceed in forma pauperis. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

Appendix C