UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3715

Calvin Bernhardt

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of North Dakota - Western
(1:20-cv-00113-DLH)

JUDGMENT

Before COLLOTON, WOLLMAN, and BENTON, 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.

April 15, 2021

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. Calvin Bernhardt, Defendant.	**ORDER DENYING DEFENDANT'S MOTION FOR HABEAS RELIEF** Case No. 1:16-cr-00080
Calvin Bernhardt, Petitioner, vs. United States of America, Respondent.	Case No. 1:20-cv-00113

Before the Court is Defendant Calvin Bernhardt's "Motion to Vacate under 28 U.S.C. § 2255" and his "Motion to Expand the Record" filed on June 30, 2020. See Doc. Nos. 143 and 145. The Government filed a response in opposition to the motion to vacate on August 21, 2020. See Doc. No. 148. A reply was filed on November 9, 2020. See Doc. No. 151. For the reasons outlined below, the motion to expand the record is granted and the motion for habeas corpus relief is denied.

I. BACKGROUND

On March 21, 2016, Bernhardt was charged in a two-count complaint with attempted production of images depicting the sexual exploitation of minors in violation of 18 U.S.C. § 2251 and attempted receipt of images depicting the sexual exploitation of minors in violation of 18 U.S.C. §§ 2252(a)(2). See Doc. No. 1. On April 6, 2016, a four-count indictment was filed alleging one count of attempted

sexual exploitation of a child in violation of 18 U.S.C. § 2251(a) and 2251(e); one count of attempted receipt of images depicting the sexual exploitation of children in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1); one count of possession of counterfeit obligations of the United States in violation of 18 U.S.C. § 472; and one count of attempted tampering with a witness in violation of 18 U.S.C. § 1512(b)(3). See Doc. No. 25. A six-count superseding indictment was filed on June 1, 2016, adding one count of attempted tampering with a witness in violation of 18 U.S.C. § 1512(b)(2) and one count of attempted travel with intent to engage in illicit sexual conduct in violation of 18 U.S.C. §§ 2423(b) and 2423(e). See Doc. No. 36.

After a four-day trial, Bernhardt was found guilty on October 28, 2016, on all six counts as charged in the superseding indictment. See Doc. No. 66. On February 7, 2017, Bernhardt was sentenced to 360 months imprisonment on count one and count six , which were concurrent with one another. Bernhardt was sentenced to 240 months imprisonment on count two, count three, count four, and count five, which were concurrent with one another, but consecutive to counts one and six. See Doc. No. 89.

On February 7, 2017, Bernhard filed a notice of appeal, a motion to proceed *in form pauperis*, and a motion for appointment of counsel. See Doc. No. 91. The Court granted the motion to proceed *in form paurperis* and Bernhardt was appointed counsel to represent him on appeal. See Doc. Nos. 93 and 96. The Eighth Circuit Court of Appeals affirmed in part, vacated in part, and remanded to the district court for further proceedings. See Doc No. 115. The Eighth Circuit Court of Appeals rejected all of Bernhardt's challenges to the convictions but one, concluding there was insufficient evidence to support his conviction for attempted travel with intent to engage in illicit sexual conduct. Id. On remand, count six was dismissed upon order of the Eighth Circuit Court of Appeals and this Court resentenced Bernhardt on January 22, 2019, to 360 months on count one and 240 months on each of

counts two, three, four, and five. See Doc. No. 130. The sentences on counts two through five were to run concurrent with one another and 120 months of each counts four and five were to run consecutive to the sentence imposed on count one. Id.

On January 22, 2019, Bernhardt filed a notice of appeal of the amended judgment. See Doc. No. 133. The Court amended the judgment on February 26, 2019, to clarify the sentence imposed on remand was 480 months in total. See Doc. No. 137. The Eighth Circuit Court of Appeals affirmed the judgment on September 6, 2019. See Doc. No. 138.

On June 30, 2020, Bernhardt filed the instant motions to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and expand the record. See Doc. Nos. 143 and 145. In his petition, Bernhardt set forth two grounds to set aside the judgment: (1) the United States failed to disclose favorable information in violation of the right to due process and (2) he was deprived of effective assistance of trial counsel. See Doc. No. 143. On August 21, 2020, the Government filed a response arguing that Bernhardt's claims fail on the merits and that his petition should be summarily dismissed. See Doc. No. 83. Bernhardt filed a reply on November 9, 2020. See Doc. No. 151.

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.

A prisoner is entitled to an evidentiary hearing on a Section 2255 motion unless the motion, files, and records of the case conclusively show that the prisoner is not entitled to relief. 28 U.S.C. § 2255; Engelson v. United States, 86 F.3d 238, 240 (1995). A Section 2255 motion "may be dismissed without hearing if (1) movant's allegation, 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, are inherently incredible, or are conclusions rather than statements of fact." See Winters v. United States, 716 F.3d 1098 (2013); see also, Holloway v. United States, 960 F.2d 1348, 1358 (8th Cir. 1992) (a single, self-serving, self-contradicting statement is insufficient to render the motions, files and records of the case inconclusive); Smith v. United States, 618 F.2d 507, 510 (8th Cir. 1980) (mere statement of unsupported conclusions will not suffice to command a hearing).

III. LEGAL DISCUSSION

Bernhardt alleges two grounds for vacating the judgment: (1) the United States failed to disclose favorable information in violation of Bernhardt's right to due process and (2) Bernhardt was deprived of the effective assistance of counsel in preparation for and during his trial. See Doc. No. 143. The Court addresses each ground in turn.

A. Claim of Failure to Disclose Favorable Information

In Bernhardt's first ground to vacate the judgement, he alleges the Government "withheld critical impeachment evidence against their star witness, Jean Oliver Boston." See Doc. No. 144, p. 2. Specifically, Bernhardt alleges that Jean Oliver Boston ("Boston") was arrested for "pimping her 15-year old daughter, but was granted use immunity to testify against Bernhardt at his trial – with the intention of manipulating the jury into believing that Boston expected no benefit from her testimony." Id. The Government asserts it did not fail to disclose favorable information because Bernhardt admitted the information about Boston was available to defense counsel and Bernhardt did not raise these claims on direct appeal.

1. Bernhardt's *Brady* claim is procedurally barred.

In its response, the Government asserts Bernhardt's *Brady* claims are procedurally defaulted because he failed to raise them on direct appeal. "Because habeas relief is an extraordinary remedy which will not be allowed to do service for an appeal, significant barriers exist in the path of a petitioner who seeks to raise an argument collaterally which he failed to raise on direct review." United States v. Moss, 252 F.3d 993, 1001 (8th Cir. 2001) (internal citations omitted). However, where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either (1) cause for the default and actual prejudice or (2) actual innocence. Id. See also Bousley v. United States, 523 U.S. 614, 621 (1998). Bernhardt failed to raise any *Brady* claims on his previous appeals; therefore, Bernhardt's claim is procedurally barred. See Doc. Nos. 115 and 138.

2. Notwithstanding the procedural bar, Bernhardt has failed to demonstrate any *Brady* violation.

The *Brady* rule requires prosecutors to disclose materially exculpatory evidence in the government's possession to the defense. See Brady v. Maryland, 373 U.S. 83 (1963). Materially exculpatory evidence includes any evidence favorable to the accused. Id. at 87. The government must disclose any evidence both favorable to an accused and material to guilt or to punishment. United States v. Whitehill, 532 F.3d 746, 753 (8th Cir.2008) (internal citations omitted). The United States Supreme Court has also determined that the government has an affirmative duty to "disclose matters that affect the credibility of prosecution witnesses." United States v. Morton, 412 F.3d 901, 906 (8th Cir.2005) (citing Giglio v. United States, 405 U.S. 150 (1972)). The failure to disclose *Giglio* evidence requires a new trial if the withheld information is deemed "material." United States v. Garcia, 562 F.3d 947, 952 n. 7 (8th Cir.2009) (citing United States v. Spinelli, 551 F .3d 159, 164 (2nd Cir.2008)). The materiality standard under either *Brady* or *Giglio* requires the defendant to show that there is a reasonable probability that, had it been disclosed to the defense, the result of the proceedings would have been different. Id. A reasonable probability of a different result is shown when the government's failure to disclose "undermines confidence in the outcome of the trial." Id. at 953 (quoting Spinelli, 551 F.3d at 164–65). Whether the government had a duty to disclose the suppressed information under *Brady* or *Giglio* is immaterial, as the requirements for establishing a violation under either theory appear to be similar and the remedy is the same.

To succeed on a *Brady* claim, Bernhardt must establish (1) "the prosecution suppressed evidence," (2) "the evidence was favorable to him," and (3) "the evidence was material to either his guilt or his punishment." See Mandacina v. United States, 328 F.3d 995, 1001 (8th Cir. 2003) (quoting United States v. Carman, 314 F.3d 321, 323–24 (8th Cir.2002)). Impeachment evidence, as well as

exculpatory evidence, falls within the *Brady* rule, and it is subjected to the same materiality analysis. United States v. Duke, 50 F.3d 571, 577 (8th Cir. 1995). However, "the government does not suppress evidence in violation of *Brady* by failing to disclose evidence to which the defendant had access through other channels." United States v. Roy, 781 F.3d 416, 421 (8th Cir. 2015).

Bernhardt alleges the government may have knowingly offered perjured testimony from Boston, namely that Boston contradicted herself about being arrested by Filipino authorities. See Doc. Nos. 144, pp. 9-10 and 145. Bernhardt contends that the government attempted to bolster Boston's credibility and manipulate the jury through the following testimony:

> Q. Now, has anybody from the Philippine government promised you anything to come here and testify?
>
> A. What are they going to promise?
>
> Q. Anything about charges or anything criminal-wise in the Phillippines?
>
> A. None.
>
> Q. Has anybody from the United States government done that, promised you anything criminal-wise for testifying?
>
> A. None.

See Doc. Nos. 100, pp. 30-31 and 144, p. 8.

First, Bernhardt offers the following testimony on Boston's cross examination to discredit her testimony on direct examination:

> Q. When this investigation started or shortly after this investigation started, Lxxxxxx was taken away from you, correct?
>
> A. Yes. Yes, sir.
>
> Q. And you were arrested by the Filipino authorities.
>
> A. No, sir.

Q. Did they tell you that they were investigating you for using your child in a sex offense?

A. No, sir.

Q. What reason did they give you for taking your child from you?

A. Because of Calvin.

Q. Calvin is in the United States. You're in the Philippines, literally the other side of the globe, in Asia. And the Filipino police or social services took your daughter from you.

A. Yes, sir.

Q. And they told you it was because of who you were.

A. Excuse me, sir?

Q. They told me because it was who you were.

A. No, not that, sir.

Q. You think that by coming here and testifying, that you'll be reunited with your daughter.

A. Yes.

Q. And you would say anything to accomplish that, wouldn't you?

A. No, sir, just what's in me.

See Doc. Nos. 100, pp. 44-45 and 144, pp. 9-11. Second, Bernhardt contends Boston's testimony on direct examination is further contradicted by information known by Bernhardt's trial counsel, Guy Womack ("Womack"). See Doc. Nos. 144, p. 9 and 145.

Bernhardt has failed to demonstrate the government suppressed evidence. A prosecutor has "no duty to disclose evidence that is 1) neutral, speculative or inculpatory, 2) available to the defense from other sources, 3) not in the possession of the prosecutor, or 4) over which the prosecutor has no actual or constructive control." United States v. Flores-Mireles, 112 F.3d 337, 340 (8th Cir. 1997). Bernhardt

admitted that he and his defense counsel were aware a news article existed indicating Boston had been arrested and charged with attempted sex trafficking of a minor. See Doc. Nos. 144, p. 9 and 18; and 145, p. 2. The above referenced portion of Boston's cross examination indicate Womack knew of and cross examined Boston on the subject of her alleged arrest in the Philippines. In addition, Bernhardt offers no evidence that Boston was granted use immunity in her home country, other than his self-serving affidavit. However, Boston was approved to come to the United States to testify because of a mutual legal assistance treaty, which is an agreement between the United States government and the Philippine government. See Doc Nos. 99, p. 60; 148-1. As part of the treaty's conditions, Boston was provided a safe passage letter that provides she will not be prosecuted in the United States for anything except perjury. Id. The Court finds Bernhardt has failed to demonstrate the Government suppressed evidence or offered perjured testimony.

Further, the alleged suppressed evidence was not material to Bernhardt's guilt or his punishment. At trial the Government offered a substantial amount of evidence indicating Bernhardt's guilt, including approximately 1.75 million pages of Bernhardt's Facebook data, naked photographs of female breasts and genitalia, and testimony from the victim. See Doc. Nos. 98, p. 107; 99, pp. 28-30; 100, pp. 46-62. The record shows the Court did not heighten Bernhardt's sentence due to his conduct with Boston:

> MR. MORRISON: One concern I have, which I feel is necessary for me to put on the record, is that recently I discovered a - I think it's the Philippine Times, an article that came out in that paper a number of months before trial indicating – well, the allegation that the mom in this case was involved in some way in trafficking or pimping out her daughter or contributing in some way to this crime, and that's – that's not to seek to argue that Mr. Bernhardt is not culpable or that he's less culpable.

And again, I don't know what the truth of that article is, but I feel it behooves me to put it on the record that if Your Honor is basing his sentence in part on the effect of Mr. Bernhardt's conduct on the mom, for purposes potentially of appeal that – potentially for any future 2255 motion, I want to bring it to the Court's attention.

And I suppose to preserve the record, I will lodge it as a formal objection to Your Honor's sentence to the extent that that sentence is based on the effect of Mr. Bernhardt's conduct on the mom.

THE COURT: Mr. Delorme?

MR. DELORME: Brief response, Your Honor. The Court is well aware of the communications that took place between Mr. Bernhardt and the mother in this particular matter. The Philippine government, I believe, did look at charging the mother, if not did charge the mother for those communications that were involved and that were part of the trial in this – in this particular case. The Court is well aware of that.

I can indicate to the Court that the Philippine government, based upon that, did take custody of the victim in this particular matter. Custody of that victim has never been returned to the mother. She remains in the child protective services of the Philippines. I believe she's about to turn 18 fairly soon and she's about to graduate from their high school system in the very near future, so she's never been returned to her family based upon this case and the conduct of the mother.

So the effect on the victim in this particular case is real, and it remains in effect today as she has never been able to even have contact with much of her family.

> THE COURT: All right. Well, so the record is clear, my sentence was not based on the impact that this – that Mr. Bernhardt's conduct had on the mother. I listened carefully to the testimony of every witness that appeared at the trial, and certainly every witness's testimony has some impact on this case and how I viewed this case and how I viewed the appropriate sentence, but – I'll leave it at that.

See Doc. No. 136, pp. 21-22. The Court finds Bernhardt's assertions are speculative at best, and do not establish that the government suppressed evidence nor offered perjured testimony at trial. Accordingly, the Court finds Bernhardt is not entitled to relief on these claims.

B. Claim of Ineffectiveness of Trial Counsel

In his motion, Bernhardt also asserts he was deprived of effective assistance of counsel in preparation for and during trial. The Government asserts Bernhardt has failed to satisfy his burden under the *Strickland* test, requiring his claim to be dismissed.

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). 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.

When the defendant asserts that there are multiple deficiencies, each claim is reviewed independently. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006). There is no "cumulative error" rule applied to assistance of counsel claims. United States v. Robinson, 301 F.3d 923, 925 n.3 (8th Cir. 2002).

Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel. United States v. Orr, 636 F.3d 944, 952 (8th Cir. 2011) (internal citations omitted). A failure to impeach constitutes ineffective assistance when there is a reasonable probability that, absent counsel's failure, the jury would have had reasonable doubt of the petitioner's

guilt. Id. It is very difficult to show the trial outcome would have been different had specific questions been asked on cross examination,' particularly where other trial testimony repeatedly corroborated the [challenged] testimony. Id. at 953.

Bernhardt contends his defense counsel failed to prepare an adequate defense. Within his claim, Bernhardt repeats his assertion that defense counsel did not investigate prior to trial and failed to utilize available evidence to effectively cross examine Boston. The Government asserts Womack conducted a reasonable investigation and effectively cross examined Boston.

Bernhardt's assertions are contrary to the record. The record reflects that defense counsel sought reconsideration of the order of detention pending trial and filed a motion for speedy trial. See Doc. Nos. 33, 34, and 42. Womack filed 16 pages of voir dire questions, motioned for a directed verdict after the government's case in chief, and objected to the proposed final jury instructions. See Doc. Nos. 54; 100, pp. 63-71 and 77-83. Womack also cross examined Boston regarding her alleged arrest by the Philippine government. Bernhardt has failed to point to evidence his counsel should have found. Further, Bernhardt provided no evidence to support his claim that defense counsel failed to prepare a defense. Bernhardt has provided only conclusory, self-serving statements. Vague and factually unsubstantiated assertions are insufficient to satisfy a defendant's burden to establish by a preponderance of the evidence that his counsel's performance violated his rights. See United States v. Sparks, 191 F. Supp 3d 120, 128 (D. D.C. 2016). Accordingly, Bernhardt is not entitled to relief on this claim.

The Court has reviewed the record for instances of prosecutorial misconduct that would individually or collectively require a reversal of the conviction and finds none. Further, even if the Court were to assume the prosecution committed misconduct or defense counsel was ineffective, there

is no prejudice nor basis in the record to reverse the conviction considering the overwhelming evidence of guilt presented at trial.

IV. CONCLUSION

The Court has carefully reviewed the entire record, the parties' filings, and the relevant case law. For the reasons set forth above, Bernhardt's motion to expand the record (Doc. No. 145) is **GRANTED** and his motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 143) 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.

Dated this 18th day of November, 2020.

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