

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2838

Zachary S. Keeter

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:20-cv-00978-GAF)

JUDGMENT

Before KELLY, 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.

January 14, 2022

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

/s/ Michael E. Gans

Appendix A

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

ZACHARY S KEETER,)	
)	
Movant,)	
)	
vs.)	Case No. 4:20-cv-00978-GAF-P
)	Crim. No. 4:16-cr-00240-GAF-1
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

ORDER

Movant Zachary Keeter pleaded guilty to receipt of child pornography over the Internet and was sentenced to 72 months' imprisonment. Now before the Court is Movant's pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Doc. 1. For the reasons explained below, Movant's motion is denied. Furthermore, a certificate of appealability is denied and this case is dismissed.

I. Background

On January 22, 2015, a special agent with the Federal Bureau of Investigation downloaded 14 images and three videos depicting child pornography from username "Omck666" using a file-sharing program.¹ The FBI determined that the IP address used by Omck666 belonged to Movant, at his residence in Kansas City, Missouri.

On May 12, 2015, local FBI agents executed a search warrant at Movant's residence while he was present. During a subsequent interview, Movant admitted sharing child pornography media via the file sharing network and that he had been viewing child pornography the previous six to eight months. Movant stated he viewed child pornography while using methamphetamine. While Movant password protected his shared folder, he gave the password to anyone who requested it.

A forensic examination of Movant's computer located approximately 8,000 still images and 1,000 videos depicting minors, including prepubescent children and children under 12 years of age, engaging in sexually explicit conduct. The examination also determined, in several

¹ The factual history is summarized from the stipulated facts in the plea agreement and the undisputed facts in the presentence investigation report (PSR) without further citation.

instances, that Movant had provided his password to other users in exchange for access to their files.

On July 20, 2016, an indictment was returned by a grand jury in the Western District of Missouri charging Movant in three counts with distribution, receipt, and possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and (a)(4). Crim. Doc. 1.² Movant retained counsel to represent him. Crim. Doc. 5.

During the pretrial phase, defense counsel filed a motion seeking to suppress the statements made by Movant during the search and the subsequent search of his cellular telephone. Crim. Docs. 42, 44. After the party briefing, the magistrate court held a hearing. Crim. Docs. 47, 51, 54. Over Movant's objection, this Court adopted the magistrate court's report and recommendations that the motions be denied. Crim. Docs. 69, 70, 71.

On October 23, 2018, Movant entered into a plea agreement with the Government and pleaded guilty to receipt of child pornography. Crim. Docs. 75, 76.

The plea agreement contained a factual basis to support the guilty plea, identifying a video that Movant received using a file-sharing program on February 15, 2015. Crim. Doc. 76, pp. 2-3. Movant agreed to the sentencing procedures to be utilized by this Court, including the use of relevant conduct; the statutory penalties for the offense; the calculation of the advisory Sentencing Guidelines range; the preparation of the PSR; and this Court's discretion to calculate the Sentencing Guidelines and impose any sentence within the statutory range. Crim. Doc. 76, pp. 3-10. Regarding the sentence, the parties stipulated that Movant could request a sentence below the advisory Sentencing Guidelines range, while the Government would not argue for a sentence exceeding eight years. Crim. Doc. 76, p. 9. Movant waived his constitutional right to a jury trial and waived his right to appeal or collaterally attack his conviction and sentence except in certain circumstances. Crim. Doc. 76, pp. 10-12. Movant represented that he was entering into the plea agreement freely and voluntarily; that he was satisfied with his counsel; and that no threats or promises, outside of those contained in the plea agreement, had induced the guilty plea. Crim. Doc. 76, pp. 14-16. Movant signed and executed the plea agreement on October 23, 2018. Crim. Doc. 76, p. 17.

² "Crim. Doc." refers to the docket number entries in Movant's first criminal case, Case No. 4:16-cr-00240-GAF-1. "Doc." refers to the docket number entries in Movant's civil case, Case No. 4:20-cv-00978-GAF-P.

At the change-of-plea hearing, Movant was placed under oath. Crim. Doc. 137, p. 2. Movant established that he was mentally competent to plead guilty. Crim. Doc. 137, p. 3. Movant stated that he had discussed his case with his attorney; that his attorney had done everything requested; and that Movant did not have any questions, concerns, or complaints regarding the legal representation he received. Crim. Doc. 137, pp. 3-4. Movant in fact stated that he was totally satisfied with his counsel. Crim. Doc. 137, p. 4. Movant stated that he had read the plea agreement and understood its terms. Crim. Doc. 137, p. 4. Movant again stated that no force or promises had been made, outside of those contained in the plea agreement, to induce a guilty plea, and that his guilty plea was voluntary. Crim. Doc. 137, p. 5. Movant again acknowledged the sentencing procedures to be used by this Court. Crim. Doc. 137, pp. 6-9. Movant verbally waived his right to appeal or collaterally attack his conviction or sentence except for the enumerated circumstances. Crim. Doc. 137, p. 9. Movant also waived his constitutional rights to a jury trial. Crim. Doc. 137, pp. 9-11. Movant agreed to the stipulated facts in the plea agreement to support the guilty plea. Crim. Doc. 137, p. 11. This Court then accepted Movant's guilty plea. Crim. Doc. 137, pp. 12-13.

On February 6, 2019, a revised PSR was issued. The PSR contained a description of the offense conduct. Crim. Doc. 79, ¶¶ 7-19. The PSR calculated a base offense level of 22 under U.S.S.G. § 2G2.2(a)(2), and applied a two-level enhancement under § 2G2.2(b)(2) based on material involving prepubescent minors; a five-level enhancement under § 2D2.2(b)(3)(B) because Movant traded access to material with others; a four-level enhancement under § 2D2.2(b)(4)(A) because the images depicting babies and toddlers were included in the material; a two-level enhancement under § 2G2.2(b)(6) because Movant utilized a computer; a five-level enhancement under § 2D2.2(b)(7)(D) because the offense involved 600 images or more; and a three-level reduction under §§ 3E1.1(a) and (b) for acceptance of responsibility. Crim. Doc. 79, ¶¶ 29-41. This resulted in a total offense level of 37. Crim. Doc. 79, ¶ 42. Movant did not have any prior criminal history, resulting in a criminal history category of I. Crim. Doc. 79, ¶¶ 45-47. This resulted in an advisory Sentencing Guidelines range of 210 to 262 months. Crim. Doc. 79, ¶ 87.

The PSR also described Movant's mental and emotional health and history of substance abuse. Crim. Doc. 79, ¶¶ 59-68. After arrest, Movant received mental health and sex offender treatment and was diagnosed with post-traumatic stress disorder (PTSD) by multiple treating psychologists. Crim. Doc. 79, ¶¶ 59-63. The PSR indicated that Movant had been misdiagnosed

with attention deficit hyperactivity disorder (ADHD) and mis-prescribed Adderall. Crim. Doc. 79, ¶ 62.

Movant's defense counsel made clarifying objections to some of the facts contained in the PSR but did not object to the Sentencing Guidelines calculations. Crim. Doc. 79, pp. 23-25. Movant also requested that the supervised release conditions be altered to permit him to return to his present address. The PSR writer responded that Mo. Rev. Stat. § 566.147 prohibits Movant from residing within 1,000 feet of a school or childcare facility and that an evaluation of the residence would be completed at the time of Movant's release from custody. The PSR addendum also included a five-page statement from Movant apologizing to the victims, describing the positive steps taken since his arrest, and his plans to reintegrate into society.

On September 30, 2019, defense counsel moved to withdraw based on Movant's representation that he would seek new counsel. Crim. Doc. 93. Movant submitted a pro se motion to terminate his defense counsel. Crim. Doc. 96. Movant complained that defense counsel had failed to properly investigate his mental health background and to properly prepare a defense. Substitute defense counsel entered his appearance. Crim. Doc. 97. On October 24, 2019, Movant appeared for a scheduled sentencing hearing. Crim. Doc. 100. This Court granted the request for a continuance based on appearance of new counsel. Defense counsel used that time to file two sentencing memoranda. Crim. Docs. 105, 106.

On December 18, 2019, Movant appeared for sentencing. Crim. Doc. 107. This Court noted that Movant's clarifying objections did not alter the Sentencing Guidelines and accepted the assertions. Crim. Doc. 136, pp. 3-5. Regarding Movant's request to modify the residence restriction on supervised release, this Court noted that restriction was a state law and not subject to modification by this Court. Crim. Doc. 136, p. 4. Defense counsel called multiple witnesses in support of the sentence mitigation argument. Crim. Doc. 136, pp. 6-42. Movant personally addressed this Court and stated that he accepted responsibility for his actions, apologizing to the victims depicted in the child pornography images, and discussing his future plans to reintegrate into society. Crim. Doc. 136, pp. 42-48. Defense counsel asked this Court for leniency. Crim. Doc. 136, pp. 49-50. The Government abided by the provisions of the Sentencing Guidelines and requested a sentence of eight years. Crim. Doc. 136, pp. 50-52. This Court discussed the statutory sentencing factors under 18 U.S.C. § 3553(a). Crim. Doc. 136, pp. 52-54. This Court discussed the severity of the conduct, the damage caused by child pornography, the egregious nature of the

images and videos, and the length of sentence called for by the Sentencing Guidelines. Crim. Doc. 136, pp. 52-53. This Court then varied downward and imposed a sentence of 72 months' imprisonment, a third of the length called for by the Sentencing Guidelines. Crim. Doc. 136, pp. 53; Crim. Doc. 108.

Movant did not appeal his conviction or sentence.

After sentencing, defense counsel requested that this Court make a placement recommendation to the Bureau of Prisons and also that this Court amend the supervised release terms to permit Movant to return to his residence, potentially in violation of Missouri statutes. Crim. Doc. 111. This Court granted the placement recommendation but denied the alteration to supervised release terms. Crim. Doc. 116. Movant then filed motions seeking compassionate release, requesting that this Court modify the sentence to time served or place him on home confinement. Crim. Docs. 118-135. As part of those requests, Movant also continued to request that this Court amend the supervised release term to permit him to return to his residence. Movant now seeks to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255.

II. Legal Standard

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

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

III. Analysis

Movant present three grounds for relief, arguing numerous claims of ineffective assistance of counsel, prosecutorial misconduct, and substantive error by this Court. Doc. 1.

A. Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel may be sufficient to attack a sentence under § 2255; however, the “movant faces a heavy burden.” *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996); see *DeRoo v. United States*, 223 F.3d 919, 925 (8th Cir. 2000). To establish that counsel was ineffective, a movant must satisfy the *Strickland* test, that is Movant must “show that his[] counsel’s performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense.” *Nave v. Delo*, 62 F.3d 1024, 1035 (8th Cir. 1995) (quoting *Lawrence v. Armontrout*, 961 F.2d 113, 115 (8th Cir. 1992)); see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both prongs of the *Strickland* test must be established to be entitled to § 2255 relief; failure to establish either prong is fatal to a claim of ineffective assistance of counsel. See *Strickland*, 466 U.S. 697; *DeRoo*, 223 F.3d at 925 (“[i]f the defendant cannot prove prejudice, we need not address whether counsel’s performance was deficient”); *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997).

Under the first prong of deficient performance, Movant must overcome a “strong presumption that counsel’s conduct falls within the wide range of professionally reasonable assistance and sound trial strategy.” *Garrett v. United States*, 78 F.3d 1296, 1301 (8th Cir. 1996) (citation omitted). Second, to establish prejudice, Movant must demonstrate a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694; see *Palmer v. Clarke*, 408 F.3d 423, 444-45 (8th Cir. 2005) (citation omitted). In the context of a guilty plea, *Strickland*’s prejudice prong requires a showing of a “reasonable probability that but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial,” see *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), while in a sentencing context, a § 2255 movant must show a “reasonable probability that his sentence would have been different but for the deficient performance.” *Jeffries v. United States*, 721 F.3d 1008, 1014 (8th Cir. 2013). However, “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Strickland*, 466 U.S. at 693. Rather, a reasonable probability requires a “probability sufficient to undermine confidence in the outcome.” *Jeffries*, 721 F.3d at 1014 (citing *Strickland*, 466 U.S. at 694); see *King v. United States*, 595 F.3d

844, 852-53 (8th Cir. 2010) (finding “little doubt” of prejudice where defendant “likely would have received a much shorter sentence” had counsel challenged the sentencing court’s application of § 4B1.1).

Both prongs of this test must be established in order to be entitled to § 2255 relief; failure to establish either one of the prongs is fatal to a claim of ineffective assistance of counsel. *See Strickland*, 466 U.S. 697; *DeRoo*, 223 F.3d at 925 (“[i]f the defendant cannot prove prejudice, we need not address whether counsel’s performance was deficient”).

a. Insanity Defense

In Ground One, Movant asserts numerous claims contending defense counsel provided ineffective assistance of counsel. Doc. 1; Crim. Doc. 96. The bulk of Movant’s arguments contend that defense counsel who negotiated the guilty plea erred in not researching and advocating voluntary intoxication and insanity defenses. Movant faults his sentencing defense counsel for not seeking to withdraw his guilty plea and advocating the same affirmative defenses. Movant suggests that, had defense counsel performed adequately, he would have insisted on a trial raising these defenses.

Plea and sentencing defense counsel each provided an affidavit discussing their strategic advice and stating that they discussed the defenses and inherent risks in proceeding to trial with Movant. Docs. 8-1, 8-2. The record of the change-of-plea hearing demonstrates that Movant’s guilty plea was voluntarily and knowingly tendered. The record demonstrates that Movant received an extremely favorable sentence as a result of his guilty plea, which was far less than had he been convicted at trial and far less than recommended under the Sentencing Guidelines. Due to the manner the crime was committed, the number of images, and types of images, Movant’s advisory Guidelines range called for a sentence of 210 to 262 months. The plea agreement constrained the Government to advocating for a sentence in excess of eight years. This Court granted a downward variance, imposing a sentence below the sentence requested by the Government, which was one-third of that called for by the Guidelines.

To succeed on his claim that defense counsel’s strategy and the advice was faulty, Movant must demonstrate a reasonable probability that he would have been acquitted at trial or received a lesser sentence based on his proposed defenses. *See, e.g., Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1984) (“It is inconceivable to us . . . that Evans would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would

nevertheless have been given a shorter sentence than he actually received.”). Movant has not demonstrated that in this case.

Movant’s claim of an intoxication defense is contrary to the established case law. Case law explains that voluntary intoxication and diminished capacity are not defenses to receipt or possession of child pornography. *See United States v. Voice*, 622 F.3d 870, 876 (8th Cir. 2010) (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998) (Receipt of child pornography does not require specific intent, and as a general intent crime, “merely requires proof of knowledge of the facts that constitute the offense.”)); *see also United States v. Cameron*, 907 F.2d 1051, 1063 n. 20 (11th Cir. 1990) (cited with approval in *United States v. Yockel*, 320 F.3d 818, 825 n.4, 826 (8th Cir. 2003) (A diminished capacity defense only can be used as a defense to a specific intent crime, *United States v. White Calf*, 634 F.3d 453, 457 (8th Cir. 2011), and “[p]sychological evidence is relevant to mens rea only when the defendant is charged with a specific intent crime,”)).

The parties litigated this issue prior to Movant’s guilty plea in a motion *in limine* filed by the Government in an effort to exclude a voluntary intoxication defense and evidence of Movant’s mental state. Crim. Doc. 59. Despite Movant’s assertion that his methamphetamine use would have provided a viable defense to the charge, the case law and this Court’s previous ruling demonstrates otherwise.

As to Movant’s claims of temporary insanity, to maintain an insanity defense, a defendant must prove by “clear and convincing evidence” that at the time of the offense he suffered from a “severe mental disease or defect” that rendered him unable to appreciate the nature and quality or the wrongfulness of his acts. 18 U.S.C. § 17; *United States v. F.D.L.*, 836 F.2d 1113, 1117 (8th Cir. 1988). Mere proof of a mental disorder is not enough. *See United States v. Long Crow*, 37 F.3d 1319, 1324 (8th Cir. 1994) (even if defendant suffered from post-traumatic stress disorder, he was not entitled to insanity defense jury instruction absent evidence of the severity of his mental defect). Further, “[v]oluntary intoxication may not be considered in determining an insanity defense.” *United States v. Knott*, 894 F.2d 1119, 1122 (9th Cir. 1990) (rejecting argument that combination of schizophrenia and his voluntary use of intoxicants was permissible to meet the second prong of the test).

While the report of Dr. Brady discusses the impact of drug use upon the defendant (Crim. Doc. 105-2), it does not diagnose Movant as insane and unable to appreciate the illegality of child pornography. Movant has failed to provide the Court with any new psychological report or

affidavit of proposed testimony from any qualified expert that diagnoses Movant as temporarily insane at the time of the offense.

Consequently, because Movant has failed to identify evidence that would support an insanity defense instruction at trial or a reasonable probability that he would have been acquitted, Movant has failed to demonstrate prejudice and meet his burden to succeed on this claim. Movant's claim concerning an insanity defense in Ground One is denied.

b. Remaining Ineffective Assistance Claims

In his motion, Movant directs the Court to his memorandum (Doc. 2) and Request to Terminate Counsel of Record, filed in his criminal case (Crim. Doc. 96). As best as the Court can discern, Movant has asserted the following additional claims arguing ineffective assistance of counsel.

First, Movant contends that defense counsel was ineffective during the suppression hearing for failing to challenge the voluntariness of his statement to the FBI. Crim. Doc. 96, p. 5. However, the record demonstrates that counsel did challenge the admissibility of Movant's statement, and this Court found no merit to Movant's argument. *Id.* Thus, because this claim is contrary to the record and Movant has not demonstrated a reasonable probability that he would have been acquitted but for the interview, this claim is denied.

Second, Movant suggests that defense counsel should have objected to chain of custody for the cellular telephone. *Id.* However, Movant has not demonstrated such a challenge would have been successful. As argued by Respondent, the suppression hearing specifically addressed the delay in searching Movant's cell phone and the lack of prejudice caused by the delay. Crim. Doc. 69, pp. 15-18. Thus, this claim is denied.

Movant further complains that counsel failed to request a plea to probation and diversion, and faults defense counsel for not seeking such an agreement. Crim. Doc. 96, p. 7. In response, Respondent argues that presuming that defense counsel did not request such a plea, the response that such a plea was unavailable was appropriate, and the Government would not have consented to diversion. Thus, Movant's claim fails.

Movant also contends that his sentencing counsel was ineffective for issuing advice concerning the filing of a *pro se* motion. Doc. 2, pp. 1-2. Although the affidavit of Mr. Joseph Borich refutes this claim (Doc. 13-1, p. 3), even accepting Movant's claim as true, Movant has not demonstrated prejudice to satisfy the *Strickland* standard. In light of his favorable sentence, the

assertion that the pro se motion weakened his position with this Court is not credible. This claim is denied.

Finally, Movant further alleges his counsel failed to challenge the supervised release conditions. However, the record demonstrates that counsel objected to the supervised release conditions and that the objection was denied by this Court during and after sentencing. Because Movant's allegations are contrary to the record, this claim is denied.

Consequently, the Court finds Movant has failed to demonstrate the defense counsel provided ineffective assistance. Ground One is denied.

B. Prosecutorial Misconduct

In Ground Two, Movant contends that the Government committed prosecutorial misconduct by failing to renegotiate the plea agreement. Doc. 1, p. 5. Although Movant had already pleaded guilty to an extremely favorable plea agreement, Movant argues the Government was obligated to renegotiate the plea agreement when his mental health diagnosis was completed and additional information regarding his mental state was uncovered so that he "received a plea deal in line with similarly situated defendants." Doc. 21, p. 10.

However, as argued by Respondent, no statute or rule of criminal procedure requires the Government to conduct plea negotiations or make any formal plea offers during a criminal case. Just as a defendant may reject a plea offer, the Government is not required to extend any plea offers.

Further, Movant is unable to demonstrate a miscarriage of justice. *See Stringer v. Hedgepeth*, 280 F.3d 826, 829 (8th Cir. 2002) (requiring a showing that the alleged misconduct resulted in a denial of due process that impacted the outcome of the proceeding). As argued by Respondent, Movant had already received a plea agreement that constrained the Government from seeking a sentence above eight years' imprisonment. Defense counsel utilized Movant's mental health diagnosis when arguing for a lenient sentence. Counsel's sentencing memorandum relied heavily upon the reports of the various mental health professionals that Movant's counsel had engaged on his behalf. Counsel called multiple witnesses at sentencing to testify regarding Movant's mental state and future dangerousness. However, here, Movant has not demonstrated that a more generous sentence was warranted.

Thus, because Movant has failed to identify any conduct by the Government that violates federal statutes, rules of procedure or case law that would demonstrate prosecutorial misconduct, Movant's claim fails. Ground Two is denied.

C. Excessive Supervised Release

In Ground Three, Movant claims that his 15-year term of supervised release is excessive, resulting in "cruel and unusual punishment." Doc. 1, p. 7. Specifically, Movant states, "Mandatory minimum and 15 years supervised release is excessive in light of the fact (uncontested by the Government) that Keeter's behavior is attributable to a misdiagnosis and subsequent iatrogenic addiction." *Id.* In his motion, Movant does not further discuss the length of supervised release, but rather reasserts his rejected claims regarding his residence and contends the ban on pornographic material is overly broad. In the first ground, Movant faults his defense counsel for not challenging his supervised release.

As argued by Respondent, the claim regarding supervised release is not cognizable in a § 2255 motion. Claims of an excessive sentence are disallowed when the sentence is within the statutory range of punishment, as are claims that a severer sentence than expected was imposed. *Houser v. United States*, 508 F.2d 509, 516 (8th Cir. 1974). Movant's 15-year supervised release term is within the statutory range for the crime of five years to life supervision. The Eighth Circuit has long held that only illegal sentences – sentences imposed without or in excess of statutory authority – may be challenged in a § 2255 motion. *Sun Bear v. United States*, 644 F.3d 700, 705 (8th Cir. 2011) (quoting *Auman v. United States*, 67 F.3d 157, 161 (8th Cir. 1995)).

Movant's claim also fails because he did not raise the claim on direct appeal. *See Bousley v. United States*, 523 U.S. 614, 621 (1998) ("Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal.") (internal citation omitted); *United States v. Frady*, 456 U.S. 152, 165 (1982) ("a collateral challenge may not do service for an appeal"). Movant blames his attorney for not pursuing the claim, contending that counsel advised him the issue was not appropriate to raise on direct appeal.

Lastly, claims of cruel and unusual punishment under the Eighth Amendment are generally not cognizable on direct appeal when the sentence is within the statutory limits. *See United States v. Rodriguez-Ramos*, 663 F.3d 356, 366 (8th Cir. 2011) ("A sentence within statutory limits is generally not subject to review under the Eighth Amendment." (quoting *United States v. Murphy*, 899 F.2d 714, 719 (8th Cir. 1990) (alteration omitted)); *United States v. Patten*, 664 F.3d 247, 252

(8th Cir. 2011) (“[T]his Court has never held that a sentence within the statutory range violates the Eighth Amendment.”) (alteration in original); *see also United States v. No Neck*, 472 F.3d 1048, 1055 (8th Cir. 2007) (affirming sentence of 292 months in prison and lifetime supervised release for defendant convicted of abusive sexual contact and aggravated sexual abuse).

Therefore, Movant has not met his burden of proof. Movant argues about the length of supervised release and conditions and presumes his complaints would have succeeded. However, Movant provides no case law or analysis demonstrating actual prejudice occurred. Consequently, because Movant’s third ground for relief fails for the reasons explained above, Ground Three is denied.

IV. Evidentiary Hearing and Certificate of Appealability

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

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

V. Conclusion

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

IT IS SO ORDERED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

Dated: July 21, 2021

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

No: 21-2838

Zachary S. Keeter

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:20-cv-00978-GAF)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 16, 2022

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

/s/ Michael E. Gans

Appendix C