CASE No. _____

In The Supreme Court of the United States

CLARK WESLEY BETTS, JR.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Eighth Circuit

PETITIONER'S APPENDIX

Brandon Sample
Brandon Sample PLC
1701 Pennsylvania Ave., N.W. #200
Washington, DC 20006-5823
Phone: (202) 990-2500
Fax: (202) 990-2600
Vermont Bar No. 5573
Email: brandon@brandonsample.com
https://brandonsample.com

Counsel for Petitioner

I. TABLE OF CONTENTS

APPENDIX A

APRIL 21, 2022 ORDER & JUDGMENT
DISMISSING APPEAL

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-3760

Clark Wesley Betts, Jr.

Plaintiff - Appellant

v.

United States of America

Defendant - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:20-cv-00097-SMR)

JUDGMENT

Before LOKEN, BENTON, and ERICKSON, 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 motion to dispense with necessity of COA and to establish a briefing schedule is denied. The appeal is dismissed.

April 21, 2022

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

/s/ Michael E. Gans

APPENDIX B

July 20, 2021 ORDER DENYING 2255 MOTION
AND OTHER MISCELLANEOUS MOTIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CLARK WESLEY BETTS, JR.,	)	Case No. 4:20-cv-00097-SMR
	)	Crim. No. 4:16-cr-00158-SMR-CFB-1
Movant,	)	
	)	
v.	)	ORDER ON MOTION BROUGHT
	)	UNDER 28 U.S.C. § 2255
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

Movant Clark Wesley Betts, Jr., filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. [ECF No. 1]. Betts challenges his conviction in his criminal case, *United States v. Betts*, 4:16-cr-00158-SMR-CFB-1 (S.D. Iowa Nov. 17, 2017) ("Crim. Case"). The Court takes judicial notice of the proceedings in that case.

I. BACKGROUND

On October 25, 2016, Betts was charged with one count of sex trafficking a minor under the age of 18, one count of sex trafficking a minor under the age of 14, and two counts of distribution of crack cocaine to a person under the age of 21, in violation of 18 U.S.C. §§ 2, 1591 and 21 U.S.C. §§ 841(a)(1), 859. Indictment, Crim. Case, ECF No. 2 (sealed). A superseding indictment filed on April 25, 2017, added a third charge of drug distribution to a minor. Crim. Case, ECF No. 47 (sealed). The Government alleged Betts, a crack cocaine addict, had taught his fifteen-year-old daughter to smoke the drug and used her resulting addiction to induce sex acts in exchange for more crack cocaine. It alleged he did the same with his twelve-year-old niece. Finally, the Government accused Betts of bringing the two

minors to the house where he bought crack cocaine from his dealer so they would perform sex acts for the dealer and his housemate in exchange for crack cocaine for themselves and Betts.

A jury found Betts guilty on all counts and the Court sentenced him to life in prison. J. at 3, Crim. Case, ECF No. 154. Betts appealed his conviction to the United States Court of Appeals for the Eighth Circuit, which affirmed. *United States v. Betts*, 911 F.3d 523, 526 (8th Cir. 2018). Betts now moves to vacate his sentence, alleging he received ineffective assistance of counsel.[1]

II. SANDARD OF REVIEW

A federal inmate may file a motion to "vacate, set aside, or correct" his or her sentence under 28 U.S.C. § 2255 "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). That statute gives federal prisoners a remedy identical in scope to federal habeas corpus. *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011). Not all claimed errors in conviction and sentencing provide a basis for relief. *Id.* Beyond jurisdictional and constitutional errors, the permissible scope of a § 2255

[1] Long after filing his § 2255 motion, Betts moved pro se to fire his attorney representing him in this matter, proceed in forma pauperis, and amend his motion. *See* [ECF Nos. 16; 17; 18]. Leave to amend may granted within twenty-one days of serving it or with the leave of the Court "when justice so requires." Fed. R. Civ. P. 15(a); *see* Rule 12 of the Federal Rules of Civil Procedure Governing Section 2255 Proceedings for the United States District Courts ("The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."). Those requests are denied. Betts had ample opportunity to present every possible ground for relief in his original motion and does not identify any factual or legal arguments he would include in an amended filing. *See Geier v. Mo. Ethics Comm'n*, 715 F.3d 674, 678 (8th Cir. 2013) ("[D]enial of leave to amend a complaint may be justified if the amendment would be futile.").

collateral attack on a final conviction or sentence is "severely limited." *Id.* An error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice. *Id.*

A movant "is entitled to an evidentiary hearing on a section 2255 motion unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985) (citing 28 U.S.C. § 2255); *see also Franco v. United States*, 762 F.3d 761, 763 (8th Cir. 2014) ("No hearing is required, however, where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based."(citation omitted)). Here, the files and records conclusively show Betts is not entitled to § 2255 relief.

III. DISCUSSION

Betts raises two grounds on which he alleges his retained trial counsel, Trever Hook and William Kutmus, rendered ineffective assistance. To show counsel failed to provide constitutionally effective assistance under the Sixth Amendment to the United States Constitution, a § 2255 movant must show: (1) counsel's representation was deficient; and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish the first prong, the movant must show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 687–88. Prejudice is demonstrated by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. If the movant fails to make a sufficient showing on either one of the *Strickland* elements, he is not entitled to relief. *See id.* at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of

the inquiry if the defendant makes an insufficient showing on one."). The "ultimate focus of inquiry" is on the "fundamental fairness" of the proceeding. *Id.* at 696.

First, Betts claims Hook and Kutmus breached an essential duty by failing to file a timely notice of intent to introduce evidence of the minor victims' sexual activities after his arrest under Rule 412(c) of the Federal Rules of Evidence. Second, he asserts they were ineffective when they failed to challenge the sufficiency of the evidence against Betts at trial on the theory that he was in custody during part of the time he was charged in the indictment with ongoing criminal activity.

A. Rule 412 Notice

Betts first claims counsel rendered ineffective assistance of counsel because they failed to file a notice with the Court indicating Betts's intent to introduce evidence of other sexual activity by the minor victims when Betts was not present. Prior to trial, the Government sought to exclude evidence that the minor victims in this case had returned to the house of Betts's drug dealer after his detention and performed sex acts for the dealer in exchange for drugs without Betts's involvement. Mot. *in Limine* at 2–8, Crim. Case, ECF No. 63. Rule 412 of the Federal Rules of Evidence prohibits evidence of a victim's sexual history to prove the victim engaged in "other sexual behavior" or to prove the victim's "sexual predisposition." Fed. R. Evid. 412(a). Three exceptions apply in criminal cases:

> (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
>
> (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

> (C) evidence whose exclusion would violate the defendant's constitutional rights.

Fed. R. Evid. 412(b)(1). But the party wishing to introduce evidence under an exception to Rule 412 must serve notice on the Government, interested parties, and the victims through a motion filed with the Court that "specifically describes the evidence and states the purpose for which it is to be offered" at least fourteen days prior to trial. Fed. R. Evid. 412(c)(1). In a pretrial ruling, the Court ruled none of the exceptions applied and excluded the evidence and also noted that Betts had not filed a Rule 412(c) notice.

Betts was not prejudiced by counsel's failure to file a Rule 412(c) notice. As this Court held and the Eighth Circuit affirmed, the evidence was not admissible under Rule 412(a). *Betts*, 911 F.3d at 529 (rejecting the contention that "the evidence d[id] not constitute 'other sexual behavior' by the victims" because "that the girls prostituted themselves at some later date does not make it any less likely that, during the times alleged, Betts trafficked them, too"); Pretrial Hr'g Tr. at 26, Crim. Case, ECF No. 171 (sealed) ("It's simply not permitted under [Rule 412] to establish that a defendant who traffics a child sex abuse victim commits no crime if he's able to establish that after that trafficking occurred the child victim then continued to act as she was groomed to do by a defendant by prostituting herself."). And as the Eighth Circuit observed, the evidence was, in fact, admitted: "The jury heard that the girls returned to Cooper's house for drugs and that Terry committed a sex act against A.K. after Betts's incarceration." *Betts*, 911 F.3d at 529. Despite hearing the very testimony Betts sought to admit, the jury convicted him anyway. Betts, therefore, has not shown "a reasonable probability that . . . the result of the proceeding would have been different" had counsel filed a formal notice under Rule 412(c). *Strickland*, 466 U.S. at 694.

B. Insufficiency of the Evidence

Betts next argues counsel's performance was constitutionally defective because they did not advocate for an "alibi" defense on the theory that Betts could not have committed the crimes charged during the relevant timeframe charged in the indictment because he was detained on unrelated charges during a portion of that time. The indictment charged Betts with sex trafficking the minor victims "[f]rom on or about August 2015 until on or about April 2016." Crim. Case, ECF No. 47. At trial, the parties stipulated that Betts was in custody on between on or about March 28, 2016, and on or about April 27, 2016. Crim. Case, ECF No. 129-6.

In their affidavits responding to Bett's § 2255 motion, trial counsel both stated—based on their years of criminal law experience—that the term "on or about" in an indictment "would not require exact, specific and certain dates" because "[i]t is sufficient if the evidence establishes beyond a reasonable doubt that the offense was committed on dates reasonably near the dates alleged in the indictment." [ECF Nos. 10 at 2; 11 at 2]. They aver that because the defense posed by Betts was meritless, they were not ineffective for failing to present it. They instead favored a strategy challenging the credibility of the minor victims and other government witnesses, and assert their strategic decision to do so was not objectively unreasonable.

Counsels' understanding is well-founded. "The law is clear that the use of 'on or about' in an indictment relieves the government of proving that the crime charged occurred on a specific date, so long as it occurred within a reasonable time of the date specified." *United States v. Kenyon*, 397 F.3d 1071, 1078 (8th Cir. 2005) (citation omitted). The date of the trafficking was not "a material element of the offense" charged against Betts because he stood accused of having trafficked the minor victims and provided them with cocaine on several

occasions over a period of time. *See United States v. Duke*, 940 F.2d 1113, 1120 (8th Cir. 1991).

"Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). Indeed, counsel's "strategic choices made after thorough investigation of law and facts . . . are virtually unchallengeable." *Id.* at 690. Here, counsel did not breach an essential duty in forgoing the theory that Betts was innocent because he was in jail for one month out of the eight-month timeframe for which he was indicted. Their representation, therefore, was not objectively unreasonable. Any alleged error did not prejudice Betts.

IV. CONCLUSION

For the reasons discussed above, the files and records of this case demonstrate Betts is not entitled to any relief under 28 U.S.C. § 2255. Bett's Motion to Vacate, Set Aside, or Correct Sentence, [ECF No. 1], is DENIED. This case DISMISSED without a hearing.

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States Courts, the Court must issue or deny a Certificate of Appealability when it enters a final order adverse to the movant. District courts have the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b). A certificate of appealability may issue only if the defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing is a showing "that reasonable jurists could debate whether (or, for that matter, agree that) the

petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted). Betts has not made a substantial showing of the denial of a constitutional right on his claims. He may request issuance of a certificate of appealability by a judge with the Eighth Circuit. *See* Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated this 20th day of July, 2021.

STEPHANIE M. ROSE, JUDGE
UNITED STATES DISTRICT COURT