UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-80523-CIV-MARRA
(13-80054-CR-MARRA)

DONTAVIOUS BLAKE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT DENYING PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE is before the Court upon Dontavious Blake's ("Blake") Amended Motion to Vacate Sentence and Conviction (28 U.S.C. § 2255) [CVDE 7][1] and Blake's Memorandum of Law in support of his 28 U.S.C. § 2255 Motion [CVDE 8]. The Court has carefully considered the entire Court file including the Amended Petition [CVDE 7], the Government's Answer [CVDE 10], and the evidence presented at the May 13, 2022, hearing.

PROCEDURAL HISTORY

In March 2013, a federal grand jury in Palm Beach County, Florida returned an indictment charging Blake with one count of sex trafficking of children by force, fraud, or coercion and one count of conspiracy to commit sex trafficking of children by force, fraud, or coercion. (CRDE 32). In May 2014 a third superseding indictment charged Blake with two counts of sex trafficking of children (Counts 1, 2,) one count of conspiracy to commit sex trafficking of children (Counts 3,

1 Documents filed in the instant case regarding Blake's § 2255 petition will be cited to as "CVDE" followed by the appropriate docket entry number. Documents filed in Blakes's 2016 criminal proceeding will be referred to as "CRDE" followed by the appropriate docket entry number. Documents filed in any other court proceeding will be cited with the appropriate court case number and docket entry.

6), two counts of sex trafficking of an adult (Counts 4, 5) and one count of conspiracy to commit sex trafficking of an adult (Count 6). (CRDE147).

Jury trial commenced on October 27, 2014. (CRDE 261). At the conclusion of the nine day trial, the court granted Movant's motion for judgment of acquittal on the adult sex trafficking charges and denied the motion as to the remaining counts. (CRDE 272; CRDE 441, pp. 577-578). The jury found Movant guilty of two counts of sex trafficking of children and one count of conspiracy to sex traffic children. (CRDE 277). The court adjudicated Movant guilty and sentenced him to concurrent terms of 324 months on each count. (CRDE 373). The Eleventh Circuit affirmed the conviction and sentence. *United States v. Blake*, 868 F.3d 960 (11th Cir. 2017).

STATEMENT OF FACTS

DISCUSSION

Blake presents the following claims for relief:

I. "Ineffective assistance of trial counsel during pretrial plea bargaining process in misadvising petitioner concerning the consequences of pleading guilty." CVDE 7 at 4.

II. "Ineffective assistance of counsel during Petitioner's joint trial for failing to object to co-defendant's counsel prejudicial tactics against Petitioner creating conflict of interest." CVDE 7 at 6.

III. "Ineffective assistance of counsel for failing to file a Rule 29 Motion for Judgement of Acquittal concerning Counts 1, 2 and 3, of the indictment at the close of the Government's presentation of evidence against the Petitioner." CVDE 7 at 8.

IV. "Petitioner requests that Judge Marra disqualify (recuse) himself concerning any further proceedings associated with Petitioner's § 2255 motion under Title 28 U.S.C. § 455(a)(b)(1) for previously exhibited impartiality." CVDE 7 at 8.

The first three claims are based on the theory that counsel provided constitutionally

ineffective assistance. The standard for reviewing ineffective assistance of counsel is found in the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687. The Supreme Court instructed that courts need not address both prongs "if the defendant makes an insufficient showing on one." *Id*. at 697; *Marek v. Singletary*, 62 F.3d 1295, 1298 (11th Cir. 1995); *Butcher v. United States*, 368 F.3d 1290, 1293 (11th Cir. 2004); *Brown v. United States*, 720 F.3d 1316 (11th Cir. 2013). The burden of proof remains on the movant throughout a habeas corpus proceeding. *Roberts v. Wainwright*, 666 F.2d 517, 519 n.3 (11th Cir. 1982).

Regarding the first prong of the test, the Supreme Court advised that counsel's performance should be evaluated for "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. The Eleventh Circuit has cautioned that a reviewing court "should presume effectiveness and should avoid second-guessing with the benefit of hindsight." *Routly v. Singletary*, 33 F.3d 1279, 1287 (11th Cir. 1994), quoting *Horton v. Zant*, 941 F.2d 1449, 1460 (11th Cir. 1991); *see also Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (when courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger). Moreover, the Eleventh Circuit has recognized that, in view of the rules and presumptions set forth in *Strickland*, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between."

Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995), quoting *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994). This is so because constitutionally acceptable performance is not narrowly defined, but rather encompasses a "wide range." *Id*. at 1511. The Court in *Waters* clarified the standard of competent assistance as follows:

> The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.... We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

Id. at 1511-12, quoting *White v. Singletary*, 972 F.2d 1218, 1220-21 (11th Cir. 1992); *see also Sullivan v. Deloach*, 459 F.3d 1097, 1108 (11th Cir. 2006) (the purpose of ineffectiveness review is not to grade counsel's performance, but to determine whether that performance fell within the broad range of what might be a reasonable approach to trial). Effective assistance, therefore, does not necessarily mean errorless assistance, and counsel's record must be judged considering the entire record rather than specific actions. *Green v. Zant*, 738 F.2d 1529, 1536 (11th Cir. 1984). Clearly, tactical decisions must be accorded broad deference. *Routly v. Singletary*, 33 F.3d at 1287; *Weeks v. Jones*, 26 F.3d 1030, 1036 (11th Cir. 1994). Consequently, a petitioner seeking to rebut the strong presumption of effectiveness bears a heavy burden. *Marek*, 62 F.3d at 1298.

To establish prejudice, a defendant "must show that there is 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." *Strickland*, 466 U.S. at 694. The Supreme Court has held that any increase in the amount of prison time imposed on a defendant which is attributable to attorney error establishes prejudice. *Glover v. United States*, 531 U.S. 198, 203 (2001). With these standards in mind, the Court

reviews Blake's claims.

Claim 1: Counsel's Advice Regarding Consequences of Guilty Plea.

Blake's first complaint is that counsel misdavised him regarding the consequences of entering a guilty plea. (CVDE 7, at 5). Blake alleges that he asked counsel about the possibility of pleading guilty to the charges and wanted counsel to confer with the government concerning a plea. (CVDE 7, at 5). According to Blake, counsel asked him if he had any information to provide to the government in assisting the effort to obtain a plea agreement. (CVDE 7, at 5). Blake had no information. (CVDE 7, at 5). Counsel allegedly advised Blake that he would surely get a life sentence whether he proceeded to trial or entered a plea. (CVDE 7, at 5.) The court granted Blake an evidentiary hearing on this claim.

At the evidentiary hearing the government introduced counsel notes and correspondence between counsel and Blake showing the nature of the communication regarding plea negotiations. (CVDE 43). In an April 17, 2013, letter counsel expresses the opinion that the sentencing guidelines are very high, likely 360 months to life. (CVDE 43, EX. 3). The government had made no offer at the time this letter was sent, and counsel advised Blake that the government might consider a sentence reduction if Blake were willing to cooperate by providing information about other people involved in criminal activity. (CVDE 43, EX. 3). A November 5, 2013 letter again references the need that Blake provide information as a part of a plea deal and the lack of his ability to provide information of other criminal activity. (CVDE 43, EX. 10). In a letter dated December 18, 2013, counsel advises Blake that the government might be interested in his cooperation about other individuals who may be running a prostitution business. (CVDE 43, EX 10). On June 17, 2014, counsel sent a letter to Blake discussing Blake's decision to go to trial. (CVDE 43, EX. 12). Counsel reiterated that going to trial risks a life sentence while entering a

plea would result in a long prison sentence, but not necessarily a life sentence. (CVDE 43, EX. 12). Then on June 23, 2014, counsel sent a letter to Blake again explaining that a guilty plea might result in a sentence less than life while a conviction at trial would most likely result in a life sentence. (CVDE 43, EX. 13). Counsel advised Blake to consider the possibility of a plea in the hope of a lower sentence. (CVDE 43, EX. 13). Counsel's notes reflect conversations between himself and Blake and the efforts he made to obtain a plea agreement. (CVDE 43, EX. 1, 2, 4, 5, 7, 8. 14, 15). There are also emails reflecting the efforts of counsel to obtain a plea agreement with the government. (CVDE 43, EXs. 6, 16). The documents introduced by the government corroborate the testimony of counsel at the evidentiary hearing, which the Court finds to be credible.

To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687, 694; *Harrington v. Richter*, 562 U.S. 86, 104 (2011); *see also Premo v. Moore*, 562 U.S. 115, 121-22 (2011); *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010).

To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) (citations omitted); *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000).

Blake's claim is that counsel misadvised him regarding his sentencing exposure if he went to trial as opposed to pleading guilty. Blake's claim that counsel advised him that he would receive a life sentence whether he went to trial or pleaded guilty is refuted by the record. Counsel's testimony, corroborated by the contemporaneous correspondence, establishes that

counsel properly advised Blake of his potential exposure to a life sentence if he went to trial and the possibility of a shorter sentence if he elected to plead guilty. Considering the evidence, this claim is denied as it is refuted by the record. The advice provided by counsel was reasonable and appropriate. Hence, Blake's trial counsel's performance was not deficient. Nor was Blake prejudiced since he proceeded to trial and received a below guidelines sentence.

Claim 2: Counsel's Failure to Object to Co-defendant's Counsel Tactics.

Blake next argues that counsel was ineffective for failing to object to his co-defendant's counsel's tactic of implicating Blake by inappropriate means. (CVDE 7, at 6). Blake alleges this occurred during cross examination of government witnesses and directs the court to portions of the transcript for examples of the complained of conduct. (CVDE 8, at 2-3). The first example cited by Blake resulted in an objection by counsel. (CRDE 297, at 213). The next example cited by Blake also reflects that counsel objected to counsel's question about Blake's relationship to a man named Wayne on the ground that it required speculation. (CRDE 298, at 69-70). The final citation is to the admission of certain text messages which he argues were irrelevant and prejudicial. (CVDE 8, at 3).

Blake's citation to the record does not correlate with his allegation that co-defendant's counsel questioned an FBI agent about text messages. The Court finds that the cross-examination of the FBI agent is found at CRDE 441, pages 50-66. The specific testimony seems to be found at CRDE 441, pages 53-60 and involves the admission of text messages showing that Blake and his co-defendant had personal issues. Blake has also complained of counsel's failure to object to a witness presented by counsel for the co-defendant at sentencing. (CV DE 8, at 3.) This witness, a psychologist, testified regarding the co-defendant's relationship with Blake and mentioned the co-defendant's claim that Blake was physically abusive and had persuaded her to get involved in prostitution. (CRDE 451, at 20-21).

Blake's arguments regarding this claim are conclusory. He generally alleges that counsel should have objected to the admission of this testimony and generally alleges that he was prejudiced by its admission. However, a review of the examples cited by Blake reveals that the testimony was brief and limited and that counsel did object on two occasions. The text messages which Blake finds objectionable were in fact admissible to establish the relationship between himself and the co-defendant. The fact that they reflected some animosity in their personal relationship did not render them so prejudicial as to be inadmissible and counsel was not ineffective for failing to object. Given the otherwise overwhelming evidence of his guilt[2,] the inclusion of the supposedly objectionable testimony in no way can be said to have altered the outcome of the trial. Similarly, the testimony of the psychologist at sentencing was admissible and relevant to sentencing. Finally, Blake cannot establish prejudice as the Court entered a sentence below the guidelines.

Claim 3: Counsel's Alleged Failure to File a Motion for Judgment of Acquittal.

For his third claim, Blake contends that counsel was in effective for failing to file a motion for judgment of acquittal on Counts 1, 2, and 3. (CVDE 8, at 8). Blake alleges that the only evidence to support the element "to cause the person to engage in a commercial sex act" was the testimony of victims. (CVDE 8, at 8).

This claim is refuted by the record as counsel did move for judgment of acquittal. (CRDE 441, at 74). The Court considered the motion and granted it as to Counts 4, 5, and 6 and denied it as to Counts 1, 2, and 3. (CRDE 441, at 74-75). Thus, this claim is denied as it is refuted by the record.

Even if it could be said that counsel's motion for acquittal was somehow deficient for

2 The evidence establishing presented at trial is recounted regarding Claim 3 below.

failing to be more specific, the overwhelming evidence of guilt would have warranted a denial of the claim. Blake admits that the government had presented evidence, through the victims' testimony, that established that he had caused the victims to engage in a commercial sex act. Blake merely argues that this testimony was insufficient.

A motion for judgment of acquittal under Rule 29 "is a direct challenge to the sufficiency of the evidence presented against the defendant." *United States v. Aibejeris*, 28 F.3d 97, 98 (11th Cir. 1994); *see also United States v. Ward*, 197 F.3d 1076, 1079 (11th Cir. 1999)("In considering a motion for the entry of judgment of acquittal under [Rule 29], a district court should apply the same standard used in reviewing the sufficiency of the evidence to sustain a conviction."). In ruling on a motion for judgment of acquittal, "a district court must 'determine whether, viewing all the evidence in the light most favorable to the Government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict, a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt.' " *United States v. Grigsby*, 111 F.3d 806, 833 (11th Cir. 1997)(quoting *United States v. O'Keefe*, 825 F.2d 314, 319 (11th Cir. 1987)).

The testimony of the two minor victims established that Blake had caused them to engage in commercial sex acts. When she was 16, victim E.P. found a business card for Divine Escorts. (CRDE298, at 131-132). She called the number and spoke to Blake. (CRDE 298, at 131-132, 143-146, 150). After driving to pickup E.P. Blake took photographs to post an advertisement for her on "Backpage" for escort services. (CRDE 298, at 133, 157-159). When a call came in for E.P. Blake drove her to a hotel where she had sex in exchange for money. (CRDE 298, at 134-136). Blake regularly drove E.P. to hotels to engage in prostitution and used his credit card to post ads and pay for hotel rooms. (CRDE 298, at 140, 168). E.P. introduced the other minor

victim, T.H., to Blake. (CRDE 298, at 136). E.P. told T.H. that she was prostituting for Blake. (CRDE 297, at 21-22, 39-40). E.P. took pictures of T.H. and sent them to Blake. (CRDE 298, at 137-139). Blake picked up both girls and Blake posted an ad on Backpage for both E.P. and T.H. (CRDE 297 at 22-23; CRDE 298, at 138, 139). Blake would call the girls when someone answered the ads. (CRDE 297, at 23). Blake would drive the girls to the hotels for prostitution dates. (CRDE 297, at 28, 30-31). T.H. saw Blake after almost every prostitution call, anywhere from 10 to 12 times per day. (CRDE 297, at 24, 27-28, 34).

Blake has not contested that the evidence was sufficient to establish the other elements of the sex trafficking crime. The court must view the testimony of the two victims in the light most favorable to the government, meaning that the court must find the testimony credible. As recounted above, the testimony established that Blake (1) placed ads for the two victims for escort services; (2) drove the victims to hotels for prostitution dates; and (3) collected money from the victims afterward. The testimony of the two victims was more that sufficient to defeat a motion for judgment of acquittal.

This claim will be denied because Blake cannot establish either deficient performance or prejudice.

Claim 4: Request for Recusal

In his fourth claim, Blake asked for the recusal of the undersigned. (CVDE 7, at 8). Blake contends that a statement made by the undersigned at sentencing expressed a personal bias and showing of impartiality. (CVDE 7, at 8). The following statement is identified by Blake as evidence of bias:

> But I think she is a victim of Blake, which is different. She's not a victim of [a] crime; she's a victim of a manipulative, controlling, unscrupulous individual, who preyed upon her in a similar way the way he preyed upon the victims of the crimes. He saw a vulnerable, undereducated, insecure, weak individual who had a troubled

> past, just like the victims, used her as a victim of prostitution, and then used her as his right-hand person to perpetrate the crimes that we're here for today. So her psychological background made her easy pickings for Mr. Blake. And it's not an excuse for her to engage in the conduct, but it explains why she's here.

(CVDE 7, at 8). This statement was made during sentencing and was based on evidence presented during the trial and sentencing hearing.

As recognized by the Supreme Court:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.

Liteky v. United States, 510 U.S. 540, 550–51 (1994). However, the Court also found that "[a] favorable or unfavorable predisposition can also deserve to be characterized as "bias" or "prejudice" because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment. *Id*. at 551. It is with this guidance in mind that the undersigned considers Blakes request for recusal.

The statement referenced by Blake was made based on information acquired in the course of the proceedings. Therefore, unless the statement was so extreme as to display an inability to render fair judgment it is not grounds for recusal. The jury convicted Blake of the crime of trafficking children for prostitution for which the sentencing guidelines were 360 months to life. (CRDE 451, at 222). However, despite Blake's claim of bias, the undersigned varied below the guidelines to impost a sentence of 324 months. This downward deviation from the guidelines rebuts any claim that the undersigned was improperly biased or prejudiced against Blake.

Because Blake has not established bias or prejudice, his request that the undersigned recuses is denied.

CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying his § 2255 motion has no absolute entitlement to appeal, and to do so, must obtain a certificate of appealability ("COA"). *See Jackson v. United States*, 875 F.3d 1089, 1090 (11th Cir. 2017) (per curiam) (citing 28 U.S.C. § 2253(c)(1)). This Court should issue a certificate of appealability only if Movant makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Where a district court has rejected a movant's constitutional claims on the merits, the movant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Upon consideration of the record, a certificate of appealability is denied.

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Movant Dontavious Blake's Amended Motion to Vacate Pursuant to 28 U.S.C. § 2255 [CVDE 7] is **DENIED**.
2. Final judgment is entered in favor of the Government
3. Any pending motions are **DENIED as MOOT**.
4. No certificate of appealability shall issue.
5. The Clerk of Court is directed to **CLOSE** this case.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 6th day of July, 2022.

KENNETH A. MARRA
United States District Judge

Copies to:

Movant; Counsel of record